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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1991

WILLIE E. ENOCH,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Illinois Supreme Court's requirement of contemporaneous representation to establish a claim of conflict of interest contrary to the Sixth Amendment and this Court's holding in *Cuyler v. Sullivan*, 446 U.S. 335 (1980)?

2. Did the Illinois Supreme Court violate Enoch's due process rights when it retroactively applied a new post-trial motion rule to Enoch's case, denying appellate review of numerous errors made at Enoch's capital murder trial?

PARTIES TO THE PROCEEDINGS

Petitioner Willie E. Enoch was the defendant-appellant in the Illinois Supreme Court.

Respondent State of Illinois was the plaintiff-appellant in the Illinois Supreme Court.

There are no other parties to this case.

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WILLIE E. ENOCH,

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v.

STATE OF ILLINOIS,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

Petitioner, Willie E. Enoch, respectfully requests that a writ of certiorari issue to review the judgment and decision of the Illinois Supreme Court entered on December 19, 1991.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is published at 146 Ill. 2d 44, 585 N.E.2d 115 (1991) and is reprinted as Appendix A. The opinion of the Circuit

Court of the Tenth Judicial Circuit, Peoria County, Illinois is unpublished, but appears as Appendix B.

JURISDICTION

Enoch filed his amended petition for post-conviction relief in the Circuit Court seeking reversal of his conviction and death sentence. Without holding an evidentiary hearing, the Circuit Court dismissed the petition. The Illinois Supreme Court affirmed the denial of post-conviction relief, entering judgment on December 19, 1991. Enoch's petition for rehearing was denied February 3, 1992. The jurisdiction of this Court to review the judgment of the Illinois Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a) (1988).

STATUTES AND CONSTITUTIONS

The right to conflict-free representation resides in the Sixth Amendment to the United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U. S. Const. amend. VI.

Paragraph 9-1(i) of the Illinois Code mandates that capital murder convictions be automatically reviewed by the Illinois Supreme Court.

> The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court.

Ill. Rev. Stat. ch. 38, ¶ 9-1(i) (1989). The Illinois Constitution contains the same requirement.

> Appeals from judgments of Circuit Courts imposing a sentence of death shall be directly to the Supreme Court as a matter of right. The Supreme Court shall provide by rule for direct appeal in other cases.

Ill. Const. art. VI, § 4(b).

Unlike non-capital cases, where perfection of an appeal hinges on the filing of a timely notice of appeal, appeals in capital cases are automatically perfected upon the sentence of death.

> In cases in which a death sentence is imposed, an appeal is automatically perfected without any action by the defendant or his counsel. In other cases appeals shall be perfected by filing a notice of appeal with the clerk of the trial court. The notice may be signed by the appellant or his attorney. If the defendant so requests in open court at the time he is advised of his right to appeal or subsequently in writing, the clerk of the trial court shall prepare, sign, and file forth-

> with a notice of appeal for the defendant. No step in the perfection of the appeal other than the filing of the notice of appeal is jurisdictional.

Ill. Sup. Ct. R. 606(a).

Paragraph 116-1 of the Illinois Code governs motions for a new trial.

> (a) Following a verdict or finding of guilty the court may grant the defendant a new trial.
>
> (b) A written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict. Reasonable notice of the motion shall be served upon the State.
>
> (c) The motion for a new trial shall specify the grounds therefor.

Ill. Rev. Stat. ch. 38, ¶ 116-1 (1989).

Section 1 of the Fourteenth Amendment prohibits the States from denying anyone due process of law.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

> shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Factual Background

1. Trial Counsel's Conflict Of Interest

Petitioner Willie E. Enoch, was convicted and sentenced to death for the murder, attempted rape and aggravated kidnapping of Armanda Burns. Enoch contended that Burns had been murdered by her boyfriend -- Derek Proctor -- who was also a suspect in Burns' death.[1] (R.C416-17) No

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[1] Proctor had an extensive prior criminal record, including convictions for deviate sexual assault, armed robbery and burglary. (R.967) The modus operandi in Proctor's sexual assault was similar to that in Burns' murder. (Supp. R. at 18)
(continued...)

physical evidence proved Enoch's guilt. Instead, the State's case hinged on Proctor -- the only witness to place Enoch in Burns' apartment the night she died.

Enoch was represented by attorney Mark Rose, who had defended Proctor in a prior felony action. On the first day of trial, Rose advised the court of his earlier representation of Proctor.[2] Rose also

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[1] (...continued)
Proctor also had ample opportunity to kill Burns. (R.967)

Proctor was detained after Burns' body was discovered, (R.1649-51), and police took hair, blood, saliva, and semen samples from him, (R.1482, 1519, C416-17, PX 32). Only after Proctor implicated Enoch, was Enoch arrested and charged with Burns' murder.

[2] This was the second conflict of interest in Enoch's case. Enoch's initial public defender had informed the court early in the case that he had previously represented the husband of a collateral witness. (R.C383) Although the former client was not to be a witness and was never a suspect, the State acknowledged that ignoring such a potential conflict could require reversal. (R.C385) When
(continued...)

indicated that Proctor had been in his office more recently to discuss hiring Rose again. (App. E-5) The trial court did not inquire and was not apprised about Proctor's anticipated role as key prosecution witness; nor was the court made aware that Proctor was the only other suspect in the case and the victim's boyfriend. Just as critically, the court was not advised of Enoch's defense contention that Proctor had murdered Burns. Lacking these key facts, the court only examined whether Rose was currently representing Proctor. Concluding that the representation was not contempor-

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[2] (...continued)
Enoch refused to waive the conflict, the presiding judge ordered the case reassigned to an attorney free of any similar conflict. (R.27-29) Instead the case was assigned to Rose.

aneous, the trial court ruled there was no conflict of interest.[3] (App. E-7 to E-8)

Proctor proceeded to testify for the prosecution, clearing his own name, and putting Enoch on death row. Rose's relationship with Proctor put him in the position of needing to defend Enoch by establishing the guilt of his former client. During the course of the trial, Rose cross-examined Proctor, attacking his credibility on minor points, but omitted to question Proctor about the evidence implicating him in Burns' death.[4] (R.1006-29) On the basis of Proctor's testimony, Enoch was convicted and sentenced to die.

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[3] The colloquy regarding Rose's representation of Proctor appears in Appendix E.

[4] Rose spent the bulk of his cross-examination of Proctor on questions about Proctor's activities many hours before Burns' death, and virtually ignored the time period when Burns was killed. (R.1006-29)

2. The New Post-Trial Motion Rule

Rose knew that to preserve errors for review in non-capital cases, defense counsel must file a written motion for new trial within thirty days after a verdict of guilty. (App. F-2) In Enoch's capital case, the jury's verdict was returned after 10:00 p.m. on the last day of trial, (R.1771), and the sentencing hearing commenced the next day at 9:00 a.m., (R.1776, 1781).

The Illinois Code and constitution require automatic review of capital murder convictions. Under Illinois Supreme Court Rule 606(a), such an appeal is perfected immediately upon the sentence of death, thereby transferring jurisdiction of the case to the Illinois Supreme Court long before thirty days expire.

Rose thought the capital procedures for automatic review and immediate perfec-

tion were irreconcileable with the non-capital procedure for filing a post-trial motion within thirty days. (App. F-2 to F-3) He sought to determine whether, despite the expedited capital procedure, he was required to file a post-trial motion. Besides researching the law, Rose consulted the trial judge, and other public defenders. (App. F-4) No one he contacted could resolve the apparent conflict between the non-capital and capital procedures, (App. F-5); nor were there any cases or rules addressing the issue. Concluding that a post-trial motion was unnecessary to preserve errors for mandatory appellate review by the Illinois Supreme Court, Rose did not file one. (App. F-5 to F-6)

Enoch's conviction and death sentence were appealed directly to the Illinois

Supreme Court.[5] Without warning, the Illinois court held that a post-trial motion is required in capital cases, and that numerous claims of trial error -- errors to which Rose had properly objected at trial -- were waived due to Rose's failure to file such a motion. (App. D-25, D-36) Under the new *Enoch* rule, when capital defendants fail to file a post-trial motion, appellate review will be limited to "constitutional issues which have properly been raised at trial and which can be raised later in a post-conviction hearing petition, sufficiency of the evidence, and plain error." (App. D-37 (citation omitted)) All other issues were held to be waived. The dire result of the new rule in this case is that, through no fault of Enoch or Rose, no reviewing court

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[5] The opinion of the Illinois Supreme Court on direct appeal is reprinted as Appendix D.

has ever considered the merits of many of Enoch's substantial claims.

B. Procedural Background

After his conviction and sentence were affirmed, Enoch filed an amended petition for post-conviction relief contending, *inter alia*, that Rose had a conflict of interest that rendered him ineffective, and that the Illinois Supreme Court denied Enoch due process by creating and retroactively applying in his case the new post-trial motion rule.

Dismissing the amended petition, the Circuit Court rejected Enoch's conflict claim on the sole ground that Rose's representation of Proctor was not contemporaneous with his representation of Enoch. (App. B-5) As for Enoch's due process claim, the Circuit Court stated that the Illinois Supreme Court's decision retroactively applying the new post-trial motion

rule was binding under the doctrine of res judicata, (App. B-6), despite the fact that the claim did not arise until the Illinois Supreme Court issued its 1991 opinion.

The Illinois Supreme Court affirmed the dismissal of Enoch's conflict claim for lack of contemporaneousness. (App. A-23 to A-25) In affirming dismissal of the due process claim, the court asserted that it had not created a new rule, but simply reaffirmed existing law. (App. A-33 to A-35)

REASONS FOR GRANTING THE WRIT

This petition presents two issues of substantial importance, both of which merit plenary consideration. First, disregarding *Cuyler*, the Illinois Supreme Court held that contemporaneous representation is necessary to establish a conflict of interest impairing a defendant's Sixth Amendment right to effective assistance of counsel.

Second, the Illinois court denied Enoch's due process rights when it retroactively applied the new post-trial motion rule to Enoch's 1983 trial, with the result that numerous trial court errors have never been reviewed by any court.

Petitioner asks this Court to explicate the standard to be applied by lower courts in reviewing *Cuyler* claims in cases of successive representation. Petitioner also requests enforcement of the due process rights denied by the retroactive application of the new post-trial motion rule to his case.

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN *CUYLER* AND ILLINOIS' REQUIREMENT OF CONTEMPORANEOUS REPRESENTATION.

Although Enoch's amended petition set forth facts showing an actual conflict that adversely affected Rose's trial performance, as required under *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980), the

state courts refused relief on Enoch's Sixth Amendment claim. Without reaching the question of whether Rose's performance was adversely affected by his representation of Proctor in a prior case, the Illinois courts denied Enoch's claim on the ground that representation must be contemporaneous to create an actual conflict. (App. A-23 to A-25; App. B-5)

A. <u>The Illinois Supreme Court Erred In Refusing To Apply *Cuyler*.</u>

The Sixth Amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to reasonably competent counsel and the right to counsel's undivided loyalty. *See Wood v. Georgia*, 450 U.S. 261, 271-72 (1981)); *Glasser v. United States*, 315 U.S. 60, 70, 75-76 (1942). Because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests," prejudice is presumed "when

counsel is burdened by an actual conflict of interest." *Strickland v. Washington*, 466 U.S. 668, 692 (1984)(citing *Cuyler*, 446 U.S. 335, 345-50 (1980)). "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser*, 315 U.S. at 76. Thus, as this Court held in *Cuyler*, prejudice is presumed and reversal is automatic where a defendant establishes "that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348.

Under the Illinois Supreme Court's interpretation of the Sixth Amendment, contemporaneousness is the sole, determinative consideration when a defendant alleges that a conflict of interest resulted in ineffective assistance. *See* App. A-23 to A-25. Anomalously, the

Illinois rule requires that a conviction be reversed if defense counsel contemporaneously represented an insignificant collateral witness without adverse effects on his trial performance, but mandates that a conviction be affirmed if defense counsel represented, even recently, another suspect, or a key witness against the defendant, or both.[6] The Illinois rule would automatically reject the latter claim without consideration of whether there is an actual conflict that adversely affected defense counsel's performance. The rule precludes all successive representation claims -- even if the accused's most persuasive theory of defense inculpates his counsel's former client.

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[6] The only escape afforded by the Illinois Supreme Court from this topsy-turvy view of conflict law is review under the strict *Strickland* standard, (App. A-28), which requires proof of prejudice to sustain a claim of ineffec-tive assistance of counsel. *Strickland,* 466 U.S. at 692.

The Illinois Supreme Court's conflict jurisprudence diverges from *Cuyler* not just because contemporaneousness is required, but also in terminology and effect. The Illinois high court has adopted the term "*per se* conflict" to refer to conflicts of interest that violate a defendant's Sixth Amendment right to conflict-free representation. *See People v. Spreitzer*, 123 Ill. 2d 1, 14, 525 N.E.2d 30, 35, *cert. denied*, 488 U.S. 917 (1988).

> The term '*per se*' conflict does not appear in the United States Supreme Court case law, or for that matter, in cases from [Illinois'] sister jurisdictions. Instead, it was a term invented by [the Illinois Supreme Court] in *People v. Coslet*, 67 Ill. 2d 127, 133, 364 N.E.2d 67.

Spreitzer, 123 Ill. 2d at 14, 525 N.E.2d at 34 (citations omitted).

The second prong of *Cuyler* -- a showing of adverse effect on counsel's performance -- is dispensed with under the

Illinois *per se* rule. "[T]here is no need to show that the attorney's actual performance was in any way affected by the existence of the conflict." *Id.* at 15, 525 N.E.2d at 35 (citing *People v. Washington,* 101 Ill. 2d 104, 109, 113, 461 N.E.2d 393, 395, 397, *cert. denied,* 469 U.S. 1022 (1984)).[7]

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[7] The *per se* rule is permissible insofar as it affords broader protection than required by federal law -- *i.e.*, where the rule requires reversal because representation was contemporaneous, but the conflict did not adversely affect performance. The Illinois courts cannot, however, apply the *per se* rule to deny federal rights -- *i.e.*, where successive representation resulted in an actual conflict that adversely affected the attorney's performance.

State courts cannot deprive defendants of federal rights. *See, e.g., Howlett v. Rose,* 496 U.S. 356, ___, 110 S. Ct. 2430, 2432 (1990) (citing *Douglas v. New York, N.H. & H.R. Co.,* 279 U.S. 337, 387-88 (1929)). "[S]tate courts presumptively have the obligation to apply federal law to a dispute before them and may not deny a federal right in the absence of a valid excuse." *Howlett,* 496 U.S. at ___, 110 S. Ct. 2430, 2439 n.16.

After determining that the successive nature of Rose's conflicting representations was not contemporaneous, the Illinois court erroneously proceeded to analyze Enoch's claim under *Strickland*. As this Court expressly stated in *Strickland*, however, it is *Cuyler* -- which does not require proof of prejudice -- that governs in conflict of interest cases. 466 U.S. at 692.

B. Under *Cuyler*, Reversal Of Enoch's Conviction And Sentence Is Required.

1. Rose suffered from an actual conflict.

It would be difficult to envision circumstances more fraught with inherent conflict and adverse effects on counsel's performance than where an appointed public defender representing an accused man on trial for his life must persuasively present a defense theory inculpating the attorney's former client. Yet the facts

here are even worse: Proctor was also the key witness on whom the case against Enoch hinged. Because of Rose's relationship with Proctor, his trial performance was adversely affected from beginning to end. As a consequence, Enoch was convicted of murder and sentenced to die.

Enoch's defense was that Proctor killed Burns. Proctor extricated himself from suspicion by testifying that Enoch was the killer. To present Enoch's defense to the jury, Rose would have had to show the jury the facts and evidence implicating Proctor in the murder, and persuade the jury that it was Proctor -- not Enoch -- who was guilty. Rose's failure to present Enoch's defense in the context of his successive representation of these two men under these circumstances satisfies the actual conflict prong of the *Cuyler* test.

2. Rose's performance was adversely affected by his conflict of interest.

It is evident under subsequent cases applying *Cuyler* that Rose's performance was adversely affected by the conflict. A "defense counsel's former, conflicting representation adversely affected his performance 'if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or his own personal interests.'" *See, e.g., Church v. Sullivan,* 942 F.2d 1501, 1512 (10th Cir. 1991) (quoting *United States v. Bowie,* 892 F.2d 1494, 1500 (10th Cir. 1990).

> From counsel's function as assistant to the defendant derive[s] the overarching duty to advocate the defendant's cause.... Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Strickland, 466 U.S. at 688.

Here, Enoch's defense was that Proctor was the murderer, but Rose never advocated Enoch's cause by articulating that strategy to the jury. Rose never mentioned Enoch's defense in his opening statement. Rose never apprised the jury that Proctor was a suspect, or that, as a suspect in a capital murder case, Proctor had an enormous incentive to implicate Enoch and thereby divert suspicion from himself. In closing, Rose failed to point out any of the evidence tending to show that Proctor murdered Burns. He also failed to mention to the jury that not one witness was called by the prosecution to corroborate Proctor's purported "alibi" at the time of the murder. In fact, during the entire trial, Rose's only reference to Enoch's defense was a single oblique phrase buried in the middle of his closing argument. (R.1746)

Rose's cross-examination of Proctor was just as deficient. Rose failed to inquire of Proctor regarding the similarities between the way Proctor bound his victim in the deviate sexual assault case and the way Burns' hands had been bound.[8] Rose did not ask Proctor a single question about his hour and a half delay in summoning help after allegedly seeing Enoch leave

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[8] The Illinois Supreme Court stated that evidence of Proctor's *modus operandi* was inadmissible because (1) it went beyond permissible impeachment, and (2) it differed from the *modus operandi* in Burns' death. Neither of these assertions withstands scrutiny.

First, the purported dissimilarities are questionable because equally dissimilar *modus operandi* evidence was admitted against Enoch over his objec-tion. (App. D-82 to D-92) When the prosecution sought to introduce the *modus operandi* evidence against Enoch, Rose failed to point out the similar evidence against Proctor. Second, because evidence of Proctor's *modus operandi* tended to exculpate Enoch, it was not mere impeach-ment, but substantive evidence that the jury could have relied upon to raise reasonable doubts about Enoch's guilt.

Burns' apartment. Rose also failed to ask Proctor about the two and a half hour period between his arrival at Burns' apartment and his "discovery" of Burns' body in the presence of witnesses whose attendance he had procured -- a time period more than sufficient for Proctor to have murdered Burns and disposed of incriminating evidence.[9] In fact, Rose largely ignored the critical time period and spent the bulk of the cross-examination querying Proctor about events that took place hours before Burns' death. (R.1006-29)

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[9] The State contends that Rose's cross-examination of Proctor did not fall below the minimal standard of reasonableness required under *Strickland*. The record refutes that position. But even if the State were correct, that is not the controlling standard. Enoch need only demonstrate that his attorney's performance was adversely affected by the conflict. *See Cuyler*, 446 U.S. at 348. "[R]epresentation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) (emphasis added).

Rose also ignored deficiencies in the government's proof against Enoch. Rose never pointed out to the jury (1) that Proctor was the only witness to place Enoch in the apartment where Burns was murdered; (2) that Proctor was the only witness to connect Enoch with a blood-stained shirt and knife that the prosecution offered into evidence; (3) that Enoch's fingerprints were not found anywhere in Burns' apartment;[10] or (4) that no other witness corroborated Proctor's version of the critical events.

Because Proctor's story was riddled with inconsistencies about the critical time period, it was imperative that Rose show the jury the fabrications inherent in Proctor's testimony and establish Proctor's

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[10] Rose never sought to establish whether Proctor's fingerprints were found at the scene.

guilt. Rose's conflict prevented him from doing that.

Rose's "struggle to serve two masters [cannot] seriously be doubted." *Cuyler,* 446 U.S. at 349 (quoting *Glasser,* 315 U.S. at 75).

> Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

Strickland, 466 U.S. at 692 (citation omitted). Here Rose notified the court of his conflict and the trial court had an adequate opportunity to make inquiry.

Even though Enoch was on trial for his life, Rose's conflict of interest precluded him from zealously presenting Enoch's defense that Proctor murdered Burns. More adverse effects on counsel's performance are difficult to envision.

For those reasons, *Cuyler* requires reversal of Enoch's conviction and sentence, or at a minimum, a remand to the state court for a determination of whether Rose had an actual conflict that adversely affected his performance. This Court should grant petitioner's request for a writ of certiorari to ensure that Illinois courts comply, in this case and all others, with the requirements of the Sixth Amendment.

II. RETROACTIVE APPLICATION OF THE NEW POST-TRIAL MOTION RULE DENIED ENOCH DUE PROCESS.

The Illinois Supreme Court held in 1988 on Enoch's direct appeal that the post-trial motion requirement of Paragraph 116-1 of the Illinois Code applied to capital trials -- including Enoch's 1983 trial. Because Rose did not file a post-trial motion, the court held many substantial issues waived, and Enoch was denied

meaningful appellate review of his conviction and death sentence. The prejudice to Enoch resulting from this rule change without prior notice is manifest -- no court has ever reviewed many of Enoch's claims. The retroactive application of this previously unannounced rule impugns the reliability of the trial proceedings and violates Enoch's due process rights under the Fourteenth Amendment.

A. No Pre-Existing Law Warned Enoch Of The Post-Trial Motion Requirement In Capital Cases.

In 1983, at the time of Enoch's trial, statutory procedures specific to capital cases required the Illinois Supreme Court automatically to review capital cases. Illinois Supreme Court Rule 606(a) also provided that in capital cases, "an appeal is automatically perfected without any action by the defendant or his coun-

sel."[11] Ill. Sup. Ct. R. 606(a) (emphasis added). Knowing he had made proper oral objections at trial, Rose researched Illinois law and consulted the trial judge and other defense attorneys. Satisfied that no additional motion or notice of appeal was necessary to preserve issues for review, he did not file a post-trial motion. (App. F-7 to F-11)

Almost five years later, on Enoch's direct appeal, the Illinois Supreme Court announced that Rose should have followed the non-capital criminal procedure statute and filed a post-trial motion for new trial within thirty days after the jury verdict

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[11] Once an appeal is perfected, the jurisdiction of the appellate court attaches, depriving the trial court of further jurisdiction to act. *People v. Palmer*, 193 Ill. App. 3d 745, 749, 550 N.E.2d 696, 698 (1990). In Enoch's case, the Circuit Court's sentence of death immediately divested it of jurisdiction, including jurisdiction to consider a motion for a new trial.

of guilt. Rose's failure to do so resulted in a waiver by Enoch of numerous claims of trial court error.

> Although we have not heretofore defined the limits of [mandatory appellate review in capital cases], we now hold that when the defendant fails to comply with the statutory requirement to file a post-trial motion, our review will be limited to constitutional issues which have properly been raised at trial and which can be raised later in a post-conviction hearing petition, sufficiency of the evidence and plain error.

(App. D-36 to D-37 (emphasis added; citation omitted))

The court found this new requirement in Paragraph 116-1 of the Illinois Code, which provides that "a written motion for a new trial shall be filed by the defendant within 30 days following the entry of a

finding or the return of a verdict." Ill. Rev. Stat. ch. 38, ¶ 116-1 (1977).[12]

Prior to this decision, Illinois did not have a "firmly established and regularly followed" rule requiring capital defendants to file post-trial motions to preserve complete appellate review. *Ford v. Georgia*, ___ U.S. ___, 111 S. Ct. 850, 857 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348-51 (1987)). Although both the State and the Illinois Supreme Court claim that the post-trial motion requirement for capital cases was well-established in 1983, neither the State nor the Illinois court can cite a single case prior to Enoch's trial that so held. In fact, prior to Enoch's trial, not one Illinois appellate court had held that capital defendants

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[12] Paragraph 116-1 does not set forth the consequences of failing to file a post-trial motion. Nor does the statute specify the type of criminal case to which it applies.

were required to file such a motion. The Illinois Supreme Court therefore penalized Enoch for failing to satisfy a judicial interpretation that had not been articulated at the time of his trial.

The State weakly maintains that the 1988 *Enoch* decision did not announce a new rule because it cited four "prior" cases: *People v. Shum,* 117 Ill. 2d 317, 512 N.E.2d 1183 (1987), *cert. denied,* 484 U.S. 1079 (1988); *People v. Szabo,* 113 Ill. 2d 83, 497 N.E.2d 995 (1986), *cert. denied,* 479 U.S. 1101 (1987); *People v. Porter,* 111 Ill. 2d 386, 489 N.E.2d 1329, *cert. denied,* 479 U.S. 898 (1986); and *People v. Cabellero,* 102 Ill. 2d 23, 464 N.E.2d 223, *cert. denied,* 469 U.S. 963 (1984).

Not one of these cases establishes the rule that denied Enoch's due process rights: namely, that a capital defendant who fails to file a post-trial motion for

a new trial waives all but limited issues. Even if they had, every one of these cases was decided after Enoch's trial in November 1983. Rose could not have consulted any of these cases before deciding what -- if anything -- he was required to file to preserve issues for review in an automatic capital appeal.[13]

Although the State relies on the post-1983 cases of *Porter* and *Caballero*, they do not even support its position. In *Porter*, a 1986 capital case, the defendant did file a post-trial motion, but it failed to raise the issue of the *voir dire* examination. In contradiction to the rule for which the State cites *Porter*, the Illinois Supreme

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[13] In its most recent brief to the Illinois Supreme Court, the State cited three pre-1983 capital cases in which defense counsel did file a post-trial motion. None of these cases held that a capital defendant was required to file a post-trial motion, and the mere fact that other counsel did so does not constitute precedent requiring Rose to do the same.

Court did review the *voir dire* issue. 111 Ill. 2d at 399, 489 N.E.2d at 1334.

Similarly, *Cabellero* supports Rose's conclusion that Illinois Supreme Court Rule 606(a) trumps Paragraph 116-1. In *Caballero*, the Illinois Supreme Court admonished counsel for failing to file a post-trial motion, noting that the absence of such a motion was a "deficiency ... occurring in other criminal appeals with increasing frequency." 102 Ill. 2d at 31, 464 N.E.2d at 227. This "deficiency" obviously stems from the fact that, before the 1988 *Enoch* decision, post-trial motions had not been required in capital cases. Moreover, *Caballero* does not require that post-trial motions are necessary to secure appellate review: despite the absence of a post-trial motion, the *Cabellero* court discharged its constitutional duty to

review capital cases, and examined the claims argued on appeal.

> Since this is a death penalty case, which under our constitution is automatically reviewed by this court (Ill. Const. 1970, art. VI, sec. 4(b)), we must review the case whether or not a written motion for a new trial has been filed. Otherwise, the constitutional provision for an automatic appeal would be meaningless.

Id. at 32 (emphasis added).

In affirming the denial of post-conviction relief on Enoch's due process claim, the Illinois Supreme Court admits that its 1988 decision rested on four cases "decided after defendant's trial." (App. A-34) Like the Illinois court's 1988 decision, the 1991 opinion fails to offer any pre-1983 authority setting forth the supposedly well-established post-trial rule for capital defendants. Groping for precedent to justify applying the rule to Enoch's 1983 trial, the court can only

point to Paragraph 116-1 and "this court's holding in *People v. Pickett*." *Id.*; *see People v. Pickett*, 54 Ill. 2d 280, 296 N.E.2d 856 (1973).

This purported justification skirts the real issue, however, and repeats the error of the 1988 decision. Enoch has never argued that Paragraph 116-1 was not in effect in 1983. Rather, he contends that this statute directly conflicted with the capital rule requiring automatic review, Ill. Rev. Stat. ch. 38, ¶ 9-1(i), which was the more specific rule in effect during 1983. Since *Pickett* was not a capital case, it could not have answered Rose's question about the conflicting statutes.

The failure of both the State and the Illinois court to point to a single authority existing in 1983 for the proposition that the post-trial motion rule applied in

capital cases demonstrates that there was no such law in effect at the time.

B. Retroactive Application Of The New Rule Denied Enoch Due Process And Conflicts With *Bouie*.

The rule announced in the 1988 *Enoch* decision was new and unforeseeable. The Illinois court's retroactive application of the rule in Enoch's case denied him judicial review of numerous claims of trial error. The cumulative effect of these trial errors and the court's refusal to review them drastically undermined the accuracy and reliability of Enoch's conviction and sentence. Both the due process clause of the Fourteenth Amendment and the Eighth Amendment require a fundamental degree of reliability in a capital trial -- a confidence level that is absent when a state supreme court unpredictably abdicates its appellate review responsibilities. The result of the retroactive application of

the new rule is to deprive Enoch of his liberty and, ultimately, his life, without due process. *See Bouie v. City of Columbia,* 378 U.S. 347, 354 (1964).

In *Bouie v. City of Columbia,* this Court held that a state court's reinterpretation of an existing rule and its retroactive application to the petitioner, thereby subjecting him to criminal liability, denied him due process. 378 U.S. at 354.

> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend its substantive right."

Id. (citing *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673, 678 (1930)).

Similarly, in *Douglas v. Buder,* this Court held that the retroactive application of a new judicial interpretation violated

the due process clause. 412 U.S. 430 (1973). In *Douglas*, the terms of petitioner's probation required him promptly to report any arrests to his probation officer. Petitioner subsequently received a traffic citation and, eleven days later, reported it. Based on the eleven-day delay, the state court revoked petitioner's probation, holding that a traffic citation constituted an "arrest." *Id.* at 431. This Court found that a denial of due process.

> [N]o prior Missouri decisional law [was] cited to support the contention that a traffic citation [constituted an arrest]. ... [T]he unforeseeable application of that interpretation ... deprived petitioner of due process.

Id. at 432.

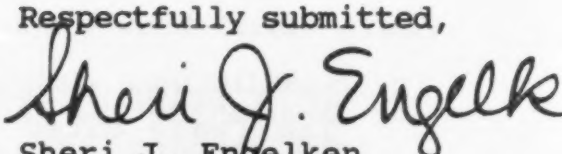
As in *Douglas*, the 1988 *Enoch* decision did not cite any authority to support the contention that a post-trial motion was necessary to preserve issues in automatic capital appeals. Enoch was entitled to

"fair warning of the conduct" the Illinois statute required. *Bouie*, 378 U.S. at 350. Retroactive application of the new rule therefore deprived Enoch of due process of law.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Illinois Supreme Court.

Respectfully submitted,



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APPENDIX

(2)

91-1736

Supreme Court, U.S.
FILED
MAY 1 1992
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term 1991

WILLIE E. ENOCH,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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May 1, 1992

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APPENDIX A

(No. 70254. -- Judgment affirmed.)
THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,
v.
WILLIE E. ENOCH,
Appellant.

Opinion filed December 19, 1991.
Rehearing denied February 3, 1992.

1. CRIMINAL LAW -- *a post-conviction petition is a collateral attack on a prior judgment and is not an appeal from the underlying conviction.* An action for post-conviction relief represents a collateral attack on the prior judgment; and is not an appeal from the underlying conviction and sentence. (Page 50.)

2. CRIMINAL LAW -- *before a post-conviction petitioner is entitled to relief, he must show that a substantial denial of constitutional rights occurred in the proceedings under attack.* To be entitled to post-conviction relief, a petitioner must establish a substantial deprivation of Federal or State

constitutional rights in the proceedings that produced the judgment under attack. (Page 50.)

3. CRIMINAL LAW -- *rulings on issues raised at trial or on direct appeal are res judicata on post-conviction, and issues that could have been raised but were not are waived.* In post-conviction proceedings, rulings on issues that were previously raised at trial and on direct appeal are *res judicata*; and issues that could have been raised in the original proceedings, but were not, will be deemed waived. (Page 50.)

4. CRIMINAL LAW -- *the right to effective assistance of counsel entitles a defendant to his attorney's undivided loyalty, free from conflicting interests or inconsistent obligations.* The right to effective assistance of counsel under the sixth amendment entitled a criminal

defendant to the undivided loyalty of his attorney, free from conflicting interests or inconsistent obligations. (Pp. 51-52.)

5. CRIMINAL LAW -- *a per se conflict of interest exists if there is a professional relationship between a defense attorney and a prosecution witness which is contemporaneous with counsel's representation of the defendant.* In situations where defense counsel has previously represented a prosecution witness, it has been held that a *per se* conflict of interest exists if the professional relationship between the attorney and the witness is contemporaneous with his representation of the defendant. (Page 52.)

6. CRIMINAL LAW -- *a defendant is entitled to reversal without a showing of prejudice if his attorney had an actual or possible conflict of professional interest*

-- *per se rule*. To ensure that an accused is not denied his sixth amendment guarantee of conflict-free representation, courts have adopted a *per se* conflict of interest rule whereby allegations and proof of prejudice are unnecessary in cases where defense counsel, without the knowledgeable assent of the defendant, might be restrained in fully representing the dfendant's interests due to commitments to others; and in these *per se* conflict of interest situations, the defendant need not show prejudice in order to justify a reversal of his conviction if the attorney representing him had an actual or possible conflict of professional interest. (Page 52.)

7. CRIMINAL LAW -- *when there was no showing of a per se conflict of interest based on defense counsel's prior representation of a prosecution witness.*

No *per se* conflict of interest was shown arising from the fact that defense counsel had previously represented a prosecution witness on a felony charge where there was no evidence indicating that counsel's relationship with the witness was contemporaneous with his representation of the defendant, and where counsel stated unequivocally, when questioned by the trial judge, that his professional relationship with the witness had been terminated and that there was no current attorney-client relationship between himself and the witness. (Pp. 50-53.)

8. CRIMINAL LAW -- *a per se conflict of interest claim which was baseless did not support assertions that appellate counsel was ineffective in failing to raise this issue on direct appeal.* Where there was no *per se* conflict of interest between a defendant and his trial counsel, it could

not be said that the defendant's appellate counsel was ineffective in failing to assert the *per se* issue on direct appeal. (Page 53.)

9. CRIMINAL LAW -- *a defendant claiming ineffective assistance of counsel must show that he was prejudiced by failure of his attorney's performance to meet an objective standard of reasonableness.* a defendant claiming ineffective assistance of counsel must show that his attorney's performance fell below an objective standard of reasonableness and that the defendant was prejudiced thereby. (Pp. 54-55.)

10. CRIMINAL LAW -- *use of prior convictions to impeach a witness on cross-examination is generally limited to the introduction of certified copies of the judgments.* Generally, the limit to which a witness may be impeached on cross-

examination with prior convictions is the introduction of certified copies of the judgments of conviction. (Page 55.)

11. CRIMINAL LAW -- *once a witness admits he has been convicted as shown in a certified copy of a judgment, his impeachment has been completed.* Once a witness admits that he has been convicted as shown in certified copies of the judgment of conviction, his impeachment has been completed. (Page 55.)

12. CRIMINAL LAW -- *a court need not consider the performance component of an ineffective-assistance claim before analyzing the prejudice component.* A court considering a claim of ineffective assistance of counsel need not consider the performance component of the claim before analyzing whether or not the defendant was prejudiced. (Page 56.)

13. CRIMINAL LAW -- *when counsel was not shown to be ineffective in presenting an accused's unsuccessful claim that a prosecution witness was the perpetrator of the offenses charged -- murder, aggravated kidnapping and attempted rape.* A capital defendant failed to show ineffective assistance in trial counsel's presentation of the defendant's claim that an inculpatory witness who testified for the prosecution was the actual perpetrator of the murder, aggravated kidnapping, and attempted rape which were charged where, although the defendant claimed that his attorney failed to fully investigate or to introduce facts supporting this theory, failed to adequately cross-examine the witness, investigate contradictions in his version of events, or question him about similarities between his prior deviate sexual assault conviction and the murder,

failed to call individuals who would have testified to this witness' prior history of violence, failed to question police witnesses as to why they considered the witness to be a suspect, and failed to even articulate to the jury the theory that a witness murdered the victim, the defendant did not demonstrate either that counsel's performance fell below an objective standard of reasonableness, or that prejudice resulted, because the record made it clear that the defense attorney made every effort to discredit the prosecution's case, impeach the State's witnesses (including the witness in question), and shift the blame for the murder from the defendant to the witness, where the witness' prior deviate sexual assault conviction and the murder were factually dissimilar, where counsel did impeach the witness with the prior conviction in the

correct manner, where the defendant neither named individuals who would have testified as to the witness' prior history of violence nor brought forward affidavits or summaries of their alleged testimony in support of his accusation, and where the evidence of the defendant's guilt was so overwhelming that there was no reasonable possibility that, but for the alleged ineffectiveness, the result of the proceedings would have been different. (Pp. 53-57.)

14. CRIMINAL LAW -- *when a defendant held to have waived claims of trial error by failing to file a post-trial motion was not thereby denied due process on the theory that he was retroactively subjected to a "new waiver rule" -- post-conviction.* A defendant who had been found on direct appeal to have waived claims of trial error by his failure to file a post-trial motion

could not successfully contend in post-conviction proceedings that he had been denied due process by being retroactively subjected to a "new waiver rule" where the statute in effect at the time of his 1983 trial provided that a "written motion for a new trial shall be filed by the defendant" and that the "motion for a new trial shall specify the grounds therefor" (Ill. Rev. Stat. 1983, ch. 38, par. 116-1), and where, at the time of his trial, it had been held in *People v. Pickett* (1973), 54 Ill. 2d 280, that failure to specify grounds for a new trial in a written motion for a new trial constitutes waiver of the issue on review, in the absence of plain error. (Pp. 57-58.)

15. CRIMINAL LAW -- *a post-conviction petitioner could not successfully contend that the rule of waiver on appeal was unfairly applied to him where that waiver*

had been found on direct review not to have prejudiced him -- post-trial motions. A post-conviction petitioner could not successfully contend that, on direct appeal, he had been unfairly subjected to the waiver rule by reason of his failure to file a post-trial motion where it had also been held in that direct appeal that the waiver to which he was subjected was not prejudicial to him. (Pp. 57-58.)

16. CRIMINAL LAW -- *post-conviction claims that the Illinois death penalty statute removes all discretion from the sentencer were rejected by the supreme court and were also found to have been waived by failure to assert them on direct appeal.* A post-conviction petitioner's claim that the Illinois death penalty statute is unconstitutional in removing all discretion from the sentencing authority was rejected by the supreme court and was

also found to have been waived by failure to include it among the numerous constitutional challenges to the death penalty statute which were asserted by the defendant in his direct appeal. (Pp. 58-60.)

Appeal from the Circuit Court of Peoria County, the Hon. Robert E. Manning, Judge, presiding.

Sheri J. Engelken, Leslie M. Smith, Sara R. Slaughter and David P. Berten, of Kirkland & Ellis, of Chicago, for appellant.

Roland W. Burris, Attorney General, of Springfield (Rosalyn Kaplan, Solicitor General, and Terence M. Madsen and Nathan P. Maddox, Assistant Attorneys General, of counsel), for the People.

JUSTICE CLARK delivered the opinion of the court:

Following a jury trial in the circuit court of Peoria County, defendant, Willie E. Enoch, was convicted of murder, aggravated kidnapping and attempted rape. Defendant waived a jury at the death penalty hearing, and the circuit judge found defendant eligible for the death penalty based on two felony murder convictions; murder in the course of aggravated kidnapping and murder in the course of attempted rape (Ill. Rev. Stat. 1983, ch. 38, par. 9-1(b)(6)). Subsequently, the judge found no mitigating factors sufficient to preclude the imposition of the death penalty, and sentenced defendant to death. On direct appeal to this court (Ill. Const. 1970, art. VI, §4(b); 87 Ill. 2d R. 603), defendant's convictions and death sentence were affirmed. (*People v. Enoch* (1988), 122 Ill. 2d 176.) The United States

Supreme Court denied defendant's petition for writ of *certiorari*. *Enoch v. Illinois* (1988), 488 U.S. 917, 102 L. Ed. 2d 263, 109 S. Ct. 274.

Thereafter, on April 13, 1989, defendant filed a *pro se* petition for post-conviction relief under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1983, ch. 38, par. 122-1 *et seq*). The circuit court appointed the public defendant of Peoria County to represent defendant on his petition for post-conviction relief. On January 22, 1990, following numerous delays in the filing of an amended petition for post-conviction relief, the State moved to dismiss defendant's *pro se* petition. On January 24, 1990, defendant moved to substitute the law firm of Kirkland & Ellis as counsel for defendant. Thereafter, on March 19, 1990, defendant filed this amended petition for post-conviction

relief. This amended petition did not adopt, re-allege or in any way refer to the allegations set forth in defendant's original *pro se* motion.

In his amended petition for post-conviction relief, defendant raised three issues. First, defendant claimed that he was denied his right to effective assistance of counsel because his trial attorney, Mark Rose, had a *per se* conflict of interest, and because his actual performance fell below the constitutional standard necessary to constitute effective assistance of counsel. Second, defendant argued that his due process rights were violated when this court retroactively applied a "new waiver rule" in his case. Third, defendant argued that the Illinois death penalty statute was unconstitutional.

Subsequently, the State filed a motion to dismiss defendant's *pro se* and amended

petition for post-conviction relief. On April 19, 1990, the circuit court, without having held an evidentiary hearing on this matter, granted the State's motion to dismiss the *pro se* petition and the amended petition. On appeal directly to this court (134 Ill. 2d R. 651), only those claims in defendant's amended petition for post-conviction relief are before us.

The facts in this case are adequately set forth in this court's opinion on defendant's direct appeal (*People v. Enoch* (1988), 122 Ill. 2d 176), and will be repeated here only when necessary.

Initially we note that an action for post-conviction relief represents a collateral attack on a prior judgment; it is not an appeal from an underlying conviction and sentence. (*People v. Ruiz* (1989), 132 Ill. 2d 1, 9; *People v. Free* (1988), 122 Ill. 2d 367, 377; *People v.*

James (1986), 111 Ill. 2d 283, 290.) To be entitled to post-conviction relief, a defendant must establish a substantial deprivation of Federal or State constitutional rights in the proceedings that produced the judgment under attack. (Ill. Rev. Stat. 1985, ch. 38, par. 122-1.) Ruling on issues that were previously raised at trial and on direct appeal are *res judicata*, and issues that could have been raised in the original proceedings, but were not, will be deemed waived. *Ruiz*, 132 Ill. 2d at 9; *People v. Silagy* (1987), 116 Ill. 2d 357, 365.

Defendant argues that he was denied his sixth amendment right to effective assistance of counsel because his trial counsel, Mark Rose, had previously represented on of the State's main witnesses, Derek Proctor. On November 14, 1983, immediately prior to jury selection,

the trial judge stated on the record that it had come to the court's attention that Rose had previously represented Proctor on a felony matter in 1979. The following colloquy ensued between the trial judge and Rose:

> "Q. [Trial Judge]: Mr. Rose, do you feel that the existence of your prior relationship with this proposed witness would cause you any difficulty insofar as your representation of the defendant, Willie Earl Enoch?
>
> A. [Mark Rose]: I don't believe so your honor.
>
> Q. Has there been an on-going relationship of attorney-client between you and Mr. Proctor?
>
> A. Only that I believe Mr. Proctor has been in the office, and I believe it is since the date of this, although I can't be sure, concerning possibly hiring me to represent him in matters. But so far as I recall, never represented him privately, and, I believe, this may be the only occasion that, in fact, I represented him.
>
> Q. There is no attorney-client relationship, is that right?
>
> A. That's correct.

Q. To the best of your recollection -- I don't mean to put words in your mouth -- but my understanding is, to the best of your recollection, your attorney client relationship with Mr. Proctor ended with the conclusion of this 1979 case, is that right?

A. I believe so. I don't recall representing -- in fact, to be truthful, I didn't remember representing him in that case until I procured the Certified Copy of Conviction this morning.

Q. Do you have any specific recollection of your representation of Mr. Proctor?

A. Now I do.

Q. Are they recollection, or do you just know it from the fact?

A. No, I recall the incident, and I recall the codefendant in the case.

Q. Just to be clear, that relationship ended in 1979, is that right?

* * *

A. Yes.

Q. You don't feel your effectiveness is impaired in any way, is that right?

A. No." (Emphasis added.)

Following this exchange, the trial judge stated "that this state of affairs *** does not constitute a conflict of

interest nor, in fact, does any conflict of interest exist based on the representation by Mr. Rose, which are amply supported by the record." We agree.

The right to effective assistance of counsel under the sixth amendment to the Constitution of the United States entitles a criminal defendant to the undivided loyalty of counsel, free from conflicting interests or inconsistent obligations. (*People v. Flores* (1989), 128 Ill. 2d 66, 83, citing *Glasser v. United States* (1942), 315 U.S. 60, 86 L. Ed 680, 62 S. Ct. 457; *People v. Washington* (1984), 101 Ill. 2d 104.) To ensure that the accused is not denied this sixth amendment guarantee of conflict-free representation, this court has adopted a *per se* conflict of interest rule "whereby allegations and proof of prejudice are unnecessary in cases where a defense counsel, without the knowledgeable

assent of the defendant, might be restrained in fully representing the defendant's interests due to his or her commitments to others." (*People v. Coslet* (1977), 67 Ill. 2d 127, 133, citing *People v. Stoval* (1968), 40 Ill. 2d 109, 112.) Moreover, in situations where defense counsel has previously represented a prosecution witness, this court has repeatedly held that *"a per se conflict of interest exists if 'the professional relationship between the attorney and the witness is contemporaneous with counsel's representation of the defendant.'"* (Emphasis added.) (*People v. Flores*, 128 Ill. 2d at 83, quoting *People v. Free* (1986), 112 Ill. 2d 154, 168; see also *People v. Thomas* (1989), 131 Ill. 2d 104, 111; *People v. Robinson* (1979), 79 Ill. 2d 147, 161; *People v. Strohl* (1983), 118 Ill. App. 3d 1084, 1092.) In these *per se*

conflict of interest situations, "the defendant need not show prejudice in order to justify a reversal of his conviction if the attorney representing him has an actual or possible conflict of professional interests." (*Thomas*, 131 Ill. 2d at 111; *People v. Washington* (1984), 101 Ill. 2d 104, 110.) Prejudice is presumed. *Thomas*, 131 Ill. 2d at 111; *Free*, 112 Ill. 2d at 167; *Coslet*, 67 Ill. 2d at 133; *Stoval*, 40 Ill. 2d at 113.

In this case, we agree with the State that Rose's previous representation of Proctor in 1979, four years prior to defendant's trial, does not establish that a *per se* conflict of interest existed between Rose and defendant. As stated above, "[w]here defense counsel has represented a State's witness, a *per se* conflict of interests exists if the professional relationship between the

attorney and the witness is *contemporaneous with counsel's representations of defendant*." (Emphasis added.) (*Thomas*, 131 Ill. 2d at 111; *Flores*, 128 Ill. 2d at 83; *Free*, 112 Ill. 2d at 168; *Washington*, 101 Ill. 2d at 110-13; see also *Robinson*, 79 Ill. 2d at 161; *Strohl*, 118 Ill. App. 3d at 1092.) Based on Rose's unequivocal responses to the trial judge's questions regarding his professional relationship with Proctor, we find no evidence indicating that Rose's relationship with Proctor was contemporaneous with Rose's representation of defendant. Rose stated that his professional relationship with Proctor ended in 1979 and that there was no current attorney-client relationship between himself and Proctor. Thus, defendant's assertion that a *per se* conflict of interest existed which denied

him his right to effective assistance of counsel is baseless.

Defendant also argues that his appellate counsel, Robert Seeder, was ineffective for failing to raise the *per se* conflict of interest claim on direct appeal. The State argues that defendant has waived the issue of ineffective assistance of appellate counsel because he failed to include it in either his *pro se* petition for post-conviction relief or his amended petition for post-conviction relief. Regardless, based on our discussion above that there was no *per se* conflict of interest between defendant and Rose, we find that appellate counsel was not ineffective for failing to raise a meritless issue.

Defendant maintains that if we determine that Rose's prior representation of Proctor does not constitute a *per se*

conflict of interest, defendant was nonetheless denied effective assistance of counsel as set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052. Specifically, defendant argues that Rose was ineffective for failing to investigate fully the facts suggesting that Proctor murdered the victim, Kay Burns; failed to investigate the contradictions in Proctor's version of events; failed to introduce evidence supporting defendant's defense that Proctor murdered the victim; failed to adequately cross-examine Proctor at trial; failed to question Proctor about the similarities between Proctor's prior sexual deviate assault conviction and the victim's murder; failed to call witnesses who would have testified to Proctor's prior history of violence; failed to question the police witnesses about why they considered Proctor.

a suspect in the victim's murder; and failed to even articulate to the jury defendant's defense that Proctor murdered the victim.

The State argues that defendant failed to raise a claim of ineffective assistance of counsel pertaining to Rose's prior representation of Proctor on direct appeal, and thus the issue is waived. (*See People v. Neal* (1990), 142 Ill. 2d 140 (rulings on issues that were previously raised at trial and on direct appeal are *res judicata*, and issues that could have been raised in the original proceedings, but were not, will be deemed waived).) In addition, the State maintains that a review of the record indicates that defendant's claims are meritless. We agree.

Although the question of whether defendant received ineffective assistance of counsel for the reasons he lists above

may be deemed waived by reason of failure to raise them on direct appeal (*People v. Gaines* (1984), 105 Ill. 2d 79, 88), we note that the record clearly does not support defendant's contentions. Under *Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, a defendant claiming ineffective assistance of counsel must show: (1) counsel's performance fell below an objective standard of reasonableness and (2) defendant was prejudiced. In this instance, defendant has failed to meet either prong of the *Strickland* standard --namely that Rose's performance fell below an objective standard of reasonableness, or that defendant was prejudiced.

First, after reviewing the record from defendant's trial, it is clear that Rose made every effort to discredit the prosecution's case, impeach the State's

witnesses, including Proctor, and shift the blame for the murder from defendant to Proctor. Second, defendant claims that Rose failed to question Proctor about the similarities between Proctor's 1980 deviate sexual assault conviction and the victim's murder. Specifically, defendant argues that Rose should have "cross-examined Proctor regarding the similarities between the way Proctor had bound the victim in his deviate sexual assault case and the way [the victim's] hands had been bound." We disagree both because Proctor's deviate sexual assault conviction is factually dissimilar from the victim's murder and because, generally, the limit to which a witness may be impeached on cross-examination with prior convictions is the introduction of certified copies of the convictions. (*See People v. Montgomery* (1971), 47 Ill. 2d 510.) "In the process

of questioning [the witness], in the court's discretion any matters appearing in the public record may be inquired into *including the court, date, nature of offense, and sentence received.*" (Emphasis added.) (M. Graham, Cleary & Graham's Handbook of Illinois Evidence §609.6, at 386 (5th ed. 1990).) However, once a witness admits he was so convicted, the impeachment has been completed. (M. Graham, Cleary & Graham's Handbook of Illinois Evidence §609.6, at 386 (5th ed. 1990).) In this case, because Rose impeached Proctor in the correct manner, we do not find that Rose acted unreasonably. Third, defendant contends that Rose should have called witnesses who would have testified to Proctor's prior history of violence. This contention, as the State correctly points out, is meritless given that defendant has failed to name these

alleged individuals and attach affidavits or a summary of their alleged testimony which would support defendant's accusation. See Ill. Rev. Stat. 1987, ch. 38, par. 122-2.

Further, even if we were to assume that Rose's performance fell below an objective standard of reasonableness, we nonetheless conclude, as this court did on direct appeal, that defendant has failed to establish actual prejudice. On direct appeal, this court noted the rule in *Strickland* that a court need not consider the performance component of an ineffective assistance of counsel claim before analyzing the prejudice component. (*Enoch*, 122 Ill. 2d at 201-02.) Consequently, this court held that, given the overwhelming evidence of defendant's guilt, defendant has failed to establish that but for counsel's alleged unprofessional errors,

the result of the proceeding would have been different. Specifically, this court stated:

> "In view of the overwhelming evidence of the defendant's guilt, and of the aggravating circumstances, it cannot be reasonably contended that the results would possibly have been different but for the alleged substandard representation by counsel." (*Enoch*, 122 Ill. 2d at 202.)

As noted on direct appeal, the evidence of defendant's guilt was overwhelming, and thus there is no reasonable possibility that but for Rose's alleged errors the result would have been different. Defendant has failed to establish actual prejudice under the second prong of the standard set forth in *Strickland*, and we deny his claim.

Defendant next argues that he was denied his constitutional right to due process when this court retroactively

applied a "new waiver rule" in his direct appeal. Defendant claims that at the time of his trial in November 1983, the law in Illinois was unclear as to whether defendant was required to file a post-trial motion for a new trial to preserve various issues for appeal. Accordingly, defendant failed to file a post-trial motion. On direct appeal, this court stated "the failure to raise an issue in a written motion for a new trial results in a waiver of that issue on appeal." (*Enoch*, 122 Ill. 2d at 185-86.) Defendant argues that the retroactive application of this "new waiver rule" violates his right to due process.

We disagree. On direct appeal, this court did not apply a new waiver rule, but rather reaffirmed the law in this State that "*[b]oth* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could

have been raised during trial." (Emphasis in original.) (*Enoch*, 122 Ill. 2d at 186.) Although we cited four cases as support which were decided after defendant's trial, but before defendant's direct appeal (see *Enoch*, 122 Ill. 2d at 186 (citing *People v. Shum* (1987), 117 Ill. 2d 317, *People v. Szabo* (1986), 113 Ill. 2d 83, 93, *People v. Porter* (1986), 111 Ill. 2d 386, 399, and *People v. Caballero* (1984), 102 Ill. 2d 23, 31)), we also explained that "[t]he requirement for a written post-trial motion is statutory, and the statute requires that a written motion for a new trial *shall* be filed by the defendant and that the motion for a new trial *shall* specify the grounds therefor. (Ill. Rev. Stat. 1983, ch. 38, par. 116-1.)" (Emphasis in original.) (*Enoch*, 122 Ill. 2d at 187.) This statutory requirement was in effect at the time of defendant's trial in November 1983,

as was this court's holding in *People v. Pickett* (1973), 54 Ill. 2d 280, that the failure to specify grounds for a new trial in a written motion for a new trial constitutes waiver of the issue on review in the absence of plain error. (*See Enoch*, 122 Ill. 2d at 187.) Parenthetically, we note that defendant apparently failed to raise this "new waiver rule" claim on direct appeal, even though the State had argued that defendant's failure to file a post-trial motion resulted in waiver of those issues. Clearly, defendant had the opportunity to raise this issue on direct appeal given the State's posture, and our prior decisions reaffirming the waiver rule in *Shum, Szabo, Porter*, and *Caballero*.

In addition, even assuming that we did in fact retroactively apply a new waiver rule in defendant's case on direct appeal, defendant was not prejudiced. On direct

appeal, appellate counsel argued that trial counsel was ineffective for failing to file a post-trial motion and preserve numerous alleged trial errors for review. (See *Enoch*, 122 Ill. 2d at 201.) As previously stated, this court held that trial counsel's failure to file a post-trial motion did not prejudice defendant. Because defendant was not prejudiced by trial counsel's failure to file a post-trial motion, defendant obviously could not have been prejudiced by an alleged retroactive application of a "new waiver rule" which required the filing of the written motion.

Lastly, defendant argues that the Illinois death penalty statute is unconstitutional. Defendant argues that the Illinois death penalty statute violates article I, section 11, of the Illinois Constitution and the eighth amendment to

the United States Constitution in that it removes all sentencing discretion from the sentencer. Specifically, defendant cites section 9-1(h) of the statute, which states that "[i]f the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court *shall* sentence the defendant to death" (emphasis added) (Ill. Rev. Stat. 1989, ch. 38, par. 9-1(h)), as indicating that the sentencer has no discretion in sentencing. According to defendant, in this case where there is a "lingering identity question" as to the murderer, the sentencer should have discretion to decide whether to impose the death penalty.

The State, on the other hand, maintains that because these arguments could have been presented on direct appeal, defendant has waived them. (See *People v.*

Neal (1990), 142 Ill. 2d 140, 146.) Further, the State argues that there is no "lingering identity question" as to the murderer, for on direct appeal this court held that the evidence of defendant's guilt is "overwhelming." (*Enoch*, 122 Ill. 2d at 202.) The State does not specifically address defendant's assertion that the death penalty statute removes all discretion from the sentencer if the defendant is found eligible for the death penalty and there are no mitigating factors sufficient to preclude the imposition of the death penalty.

We agree with the State that defendant has waived his claims regarding the constitutionality of the Illinois death penalty statute. "The purpose of the post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction that have not already

been adjudicated or *could have been.*" (Emphasis added.) (*People v. Silagy* (1987), 116 Ill. 2d 357, 365; *People v. Gaines* (1984), 105 Ill. 2d 79, 87; *People v. Williams* (1970), 47 Ill. 2d 1, 3.) On direct appeal, this court considered and rejected numerous constitutional challenges to the Illinois death penalty statute. Because defendant failed to raise on direct appeal the specific challenge he raises now, we find that he has waived review. In addition, we disagree with defendant's assertion that the sentencing authority is divested of discretion once defendant is found eligible for the death penalty. Pursuant to the statute, once a defendant is found statutorily eligible for the death penalty, the sentencing authority exercises its discretion in evaluating "any aggravating and any mitigating factors which are relevant to the imposition of the

death penalty." (*People v. Kubat* (1983), 94 Ill. 2d 437, 504, quoting Ill. Rev. Stat. 1977, ch. 38, par. 9-1(c); see also *People v. Free* (1983), 94 Ill. 2d 378, 427 ("We conclude that the sentencing body's discretion, under our statute, is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action, satisfying *Furman v. Georgia* (1972), 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726, ***").) Based on a plain reading of the Illinois death penalty statute and this court's comments in *Kubat* and *Free*, we think it is evident that the sentencing authority is statutorily required to exercise discretion when deciding whether to sentence the accused to death.

For the foregoing reasons, we affirm the decision of the circuit court dismissing the defendant's petition for

post-conviction relief. We direct the clerk of this court to enter an order setting Wednesday, March 11, 1992, as the date on which the sentence of death entered by the circuit court of Peoria County shall be carried out in the manner provided by law. (Ill. Rev. Stat. 1983, ch. 38, par. 119-5.) The clerk of this court shall send a certified copy of this mandate to the Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of the institution where defendant is confined.

Judgment affirmed.

APPENDIX B

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS PEORIA COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff/ Respondent,	)	
vs.	)	**CASE NO.** 83CF1401
WILLIE ENOCH,	)	
Defendant/ Petitioner.	)	

ORDER

Now comes for hearing the motion of the State to dismiss **Petitioner's** petition for post-conviction relief and amended petition for post-conviction relief. The People are present by Nathan P. Maddox, Assistant Attorney General, defendant is present through Sheri Engelken and Leslie Smith, two of his attorneys of record. For purposes of this motion, the Court is considering both the pro se petition for

post-conviction relief filed by respondent and the amended petition for post-conviction relief filed herein.

In the pro se petition defendant alleges that he was denied his right to the effective assistance of counsel at trial by the failure of his attorney to call certain witnesses to testify to certain alleged facts. Secondly, defendant alleged he was denied the effective assistance of counsel at his sentencing hearing for failure to call certain witnesses to testify at his behalf in mitigation as well as the allegation that his counsel failed to advise him that the vote of only one juror against death would spare his life at a sentencing hearing and that he thereby waived jury for the sentencing hearing. Lastly the defendant alleges the Illinois Death Penalty Act is unconstitutional.

Petitioner has failed to attach any supporting affidavits whatsoever as required by Illinois Revised Statutes, Chapter 38, Paragraph 122-1, and People v. Rush, 20 Ill.App.3d 165 (1974) and People v. Covington, 45 Ill.2d 105 (1970), thereby rendering first allegation unavailable to defendant. The same ruling must result on the second allegation relative to the failure of calling witnesses at the hearing in mitigation because defendant has again failed to attach any affidavits of the alleged witnesses or reasonably explained the significance of their testimony. See People v. Carmickle, 97 Ill.App.3d 917 (Third District 1981). The issue raised by defendant as to the improper waiving of a jury for his sentencing hearing was addressed by the Illinois Supreme Court by defendant's direct appeal in People v. Enoch, 122 Ill.2d 176 (1988), and that

decision is res judicata as to that issue. Defendant's last contention on his pro se petition alleging the Illinois Death Penalty Act is unconstitutional is barred by the doctrines of res judicata as the Illinois Death Penalty Act has repeatedly been held to be constitutional. See People v. Kidd, 129 Ill.2d 432 (1989).

For all of the above reasons the motion to dismiss petitioner's pro se petition for post-conviction relief is hereby granted and said petition is dismissed.

The petitioner's amended petition for post-conviction relief filed by his counsel very competently and extensively argues that his court appointed trial counsel was laboring under a per se conflict of interest thereby rendering his assistance of counsel ineffective, that trial counsel was actually ineffective at trial for

several stated reasons, that the Supreme Court's retroactive application of the waiver role denied petitioner his constitutional right to an appeal of the errors that led to his conviction and death sentence, and lastly that the Illinois Death Penalty Statute is unconstitutional.

The Court must consider petitioner's allegations in his brief together with the actual record of the trial itself. This Court finds that his trial counsel was not operating under a per se conflict of interest because he had represented a witness against the defendant in a criminal matter several years prior to Enoch's trial. There was no contemporaneous representation of the witness and petitioner Enoch. This Court further finds that Mr. Enoch's trial counsel was not ineffective after a review of the record and further that the Supreme Court in

People v. Enoch, ibid, has considered this allegation and that decision is res judicata on this Court. Also, the Illinois Supreme Court in Enoch has considered the question of retroactive application of a "new" waiver rule and the decision of the Supreme Court is binding on this Court under the doctrine of res judicata. Lastly petitioner's contentions relative to the Illinois Death Penalty being unconstitutional are hereby held to be without merit as those contentions have been considered repeatedly by the Illinois Supreme Court who has consistently held the Illinois Death Act to be constitutional. Also see Blystone v. Pennsylvania, 110 Supreme Court 1078, (1990).

For the above reasons it is hereby ordered that the motion of the State to dismiss petitioner's amended petition for post-conviction relief be, and the same is

granted and said petition is hereby dismissed.

The judgments of convictions and the sentences imposed by the Circuit Court of Peoria County have been affirmed by the Illinois Supreme Court. It is therefore the duty of this Court to direct the Clerk of this court to enter an order affixing June 18th, 1990, as the date on which the sentence of death entered in the Circuit Court is to be carried out. The defendant shall be executed by lethal injection in the manner provided by Section 119-5 of the Code of Criminal Procedure of 1963 (Illinois Revised Statutes 1983, Chapter 38, Paragraph 119-5). A certified copy of the mandate in this case shall be furnished by the Clerk of this Court to the Director of Corrections, to the Warden of Stateville Correctional Center and to the Warden of

the institution wherein the defendant is confined.

The Clerk is further directed to furnish a copy of this adverse judgment to the attorneys of record herein and to the petitioner/defendant Willie E. Enoch by certified mail.

ENTERED: This 19th day of April, 1990.

/s/ Robert E. Manning
JUDGE OF THE TENTH JUDICIAL CIRCUIT

CLERK'S COPY - WHITE
PLAINTIFF'S COPY - YELLOW
DEFENDANT'S COPY - PINK
ADDITIONAL COPY - GOLDENROD

APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
(217) 782-2035

February 3, 1992

Ms. Sheri J. Engelken
Kirkland & Ellis
200 E. Randolph Dr., S#6100
Chicago, IL 60601

No. 70254 - People State of Illinois, appellee, v. Willie E. Enoch, appellant. Appeal, Circuit Court (Peoria).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 13, 1992.

APPENDIX D

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,
v. WILLIE E. ENOCH,
Appellant.

Opinion filed February 11, 1988.
Rehearing denied May 31, 1988.

1. CRIMINAL LAW -- *failure to raise an issue in a written motion for a new trial generally results in a waiver on appeal.* As a general rule, failure to raise an issue in a written motion for a new trial results in a waiver of that issue on appeal. (Page 186.)

2. CRIMINAL LAW -- *failure to raise issues before the trial court denies that court the opportunity to grant a new trial and casts a needless burden upon the appellate process.* Failure to raise issues before the trial court denies that court the opportunity to grant a new trial, if warranted, and casts a needless burden upon appellate counsel and courts of review. (Page 186.)

3. CRIMINAL LAW -- *a motion for a new trial may be based on other grounds than trial error, such as newly discovered evidence.* A written motion for a new trial (Ill. Rev. Stat. 1983, ch. 38, par. 116-1) may include not only alleged trial errors and errors in instructions that have been properly preserved by timely objection, but also other grounds for a new trial, such as newly discovered evidence. (Page 187.)

4. CRIMINAL LAW -- *both an objection at trial and a written post-trial motion are necessary to preserve an issue for review.* Both an objection at trial and a written post-trial motion raising the issue (Ill. Rev. Stat. 1983, ch. 38, par. 116-1) are necessary, in both jury and nonjury cases, in order to preserve an alleged error for review; and it cannot be said that either one, alone, is sufficient. (Pp. 186-88.)

5. CRIMINAL LAW -- *Rule 366(b), on the scope of review, is applicable only to civil cases.* Supreme Court Rule 366(b), on the scope of review (87 Ill. 2d R. 366(b)), is applicable only to civil cases. (Pp. 188-90.)

6. CRIMINAL LAW -- *the supreme court's constitutional obligation to review capital cases does not extend to every issue not properly preserved both by objection at trial and by written post-trial motion.* The supreme court's constitutional obligation to review death penalty cases (Ill. Const. 1970, art. VI, §4(b)) does not require it to review every issue raised on appeal when the issues are not properly preserved by an objection in the trial court and a written post-trial motion. (Page 190.)

7. CRIMINAL LAW -- *trial counsel in a capital case has an obligation to see*

that the post-trial motion statute is complied with. Trial counsel in a capital case has an obligation to see that the post-trial motion statute (Ill. Rev. Stat. 1983, ch. 38, par. 116-1) is complied with, so that review will be limited to issues of some significance. (Page 190.)

8. CRIMINAL LAW -- *direct review in a capital case in which no post-trial motion is filed will be limited to sufficiency of the evidence, plain error, and constitutional issues properly raised at trial which can also be raised by post-conviction petition.* When a defendant in a capital case fails to file the post-trial motion that is necessary to preserve alleged error for review (Ill. Rev. Stat. 1983, ch. 38, par. 116-1), supreme court review will be limited to constitutional issues which have been properly raised at trial and which can be raised later in a

post-conviction hearing petition (Ill. Rev. Stat. 1983, ch. 38, par. 122-1), sufficiency of the evidence, and plain error. (Page 190.)

9. CRIMINAL LAW -- *once an arrested individual states that he wants an attorney, all interrogation must cease until the attorney is present.* Once an arrested individual states that he wants an attorney, all interrogation must cease until the attorney is present. (Page 193.)

10. CRIMINAL LAW -- *an arrested defendant's unfulfilled request for an attorney precludes police conduct that is likely to elicit an incriminating response, but not conduct normally attendant to arrest.* The uncounseled interrogation which is prohibited after an arrested defendant has requested an attorney is defined as any words or actions on the part of the police (other than those normally

attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. (Pp. 193-94.)

11. CRIMINAL LAW -- *a trial court finding that an arrested defendant's uncounseled statements were voluntary and not the product of interrogation will not be set aside if not against the manifest weight of the evidence.* A trial court finding that statements made by an arrested defendant after he requested an attorney but prior to the time an attorney was present were voluntary utterances and not the product of police interrogation will not be set aside by a reviewing court unless the trial court's determination was contrary to the manifest weight of the evidence. (Page 194.)

12. CRIMINAL LAW -- *uncounseled statements were the result of normal arrest*

procedure rather than interrogation, and the trial court's denial of a motion to suppress them as involuntary was upheld-harmless error. Uncounseled statements made by a defendant after he requested an attorney but before an attorney was present were found to be the result of police conduct normally attendant to arrest and custody, and the trial court's denial of a motion to suppress the statements as involuntary was upheld on appeal as not contrary to the manifest weight of the evidence, where the arrested defendant asked for whose murder he was going to be booked and was told the name of the victim and that a witness had seen the defendant leaving her apartment, and where the defendant responded by saying "Oh no," and by stating that he had walked with the victim to within a block of her home on the night of the murder; and, in any event, the

error in the admission of such statements, if any, was found to be harmless where other evidence established beyond a reasonable doubt that the defendant killed the victim. (Pp. 192-94.)

13. CRIMINAL LAW -- *the secret confinement element of kidnapping may be shown by proving the secrecy of either the confinement or the place of confinement.* The secret confinement element of kidnapping (Ill. Rev. Stat. 1983, ch. 38, par. 10-1) may be shown by proof of the secrecy of either the confinement or the place of confinement. (Page 195.)

14. CRIMINAL LAW -- *the supreme court rejected claims that there was not sufficient evidence to prove that a woman murdered in her apartment was secretly confined and restrained against her will for purposes of a kidnapping charge.* The supreme court rejected claims that there

was not sufficient evidence to prove the kidnapping elements that the victim was secretly confined and restrained against her will (Ill. Rev. Stat. 1983, ch. 38, par. 10-1) where a rape victim was fatally stabbed in her locked apartment while her boyfriend, who had come to pick her up, tried for at least 45 minutes to ascertain if she was in her apartment, and where blood found within the apartment and the fact that the victim's hands were bound were sufficient to show that the victim attempted to escape from the defendant and was prevented from doing so; and under these circumstances it cannot be said that the confinement was merely incidental to the rape and murder. (Pp. 195-97.)

15. CRIMINAL LAW -- *to sustain a conviction for attempted rape, proof of specific intent to commit rape is essential but may be inferred from circumstances.* In

order to sustain a conviction on a charge of attempted rape, proof of the specific intent to commit rape is essential, but may be inferred from the circumstances of the assault. (Page 197.)

16. CRIMINAL LAW -- *evidence of assault with concomitant disrobing of the victim will support a conviction for attempted rape.* Evidence of an assault with concomitant disrobing of the victim is sufficient to support a conviction for attempted rape. (Page 198.)

17. CRIMINAL LAW -- *alleged error that was not raised at trial or preserved by post-trial motion need not be considered under the plain error doctrine where the evidence of guilt is overwhelming.* Alleged trial errors that were waived by the failure of the defendant to raise the issues at trial and to preserve them in a post-trial motion will not be considered on

appeal under the plain error doctrine where the evidence of the defendant's guilt is overwhelming. (Pp. 198-99.)

18. CRIMINAL LAW -- *where the evidence is closely balanced, a court of review may consider errors that have not been properly preserved for review.* It has been held that where the evidence is closely balanced, a court of review may consider errors that have not been properly preserved for review. (Page 199.)

19. CRIMINAL LAW -- *a court is generally under no obligation to give instructions not tendered.* The general rule is that a court is under no obligations to give instructions not tendered. (Page 199.)

20. CRIMINAL LAW -- *kidnapping involves a secret confinement while unlawful restraint involves merely detaining another without legal authority.*

Kidnapping involves a secret confinement (Ill. Rev. Stat. 1983, ch. 38, par. 10-1), while unlawful restraint involves merely detaining another without legal authority (Ill. Rev. Stat. 1983, ch. 38, par. 10-3). (Page 200.)

21. CRIMINAL LAW - *a trial court was found not to have erred in refusing to instruct the jury sua sponte on unlawful restraint as a lesser included offense of aggravated kidnapping.* A trial court was found not to have erred in refusing to instruct the jury *sua sponte* on unlawful restraint (Ill. Rev. Stat. 1983, ch. 38, par. 10-3) as a lesser included offense of the aggravated kidnapping charged (Ill. Rev. Stat. 1983, ch. 38, par. 10-2) where, under the evidence in the case, the jury could not rationally have convicted the defendant of unlawful restraint or

acquitted him of aggravated kidnapping. (Pp. 199-201.)

22. CRIMINAL LAW -- *a new trial will not be granted based on claimed ineffectiveness of counsel unless the defendant shows actual prejudice and a reasonable possibility that it affected the outcome.* It has generally been held that a new trial will not be granted on the basis of claimed ineffective assistance of counsel unless the defendant shows actual prejudice and a reasonable possibility that, but for the errors in question, the result would have been different. (Page 202.)

CUNNINGHAM, J., took no part.

SIMON, J., concurring in part and dissenting in part.

Appeal from the Circuit Court of Peoria County, the Hon. Donald C. Courson, Judge, presiding.

Willie E. Enoch, appellant *pro se*, and Charles M. Schiedel, Deputy Defender, Robert D. Seeder, Assistant Defender, and Theodore A. Gottfried, State Appellate Defender, of the Office of the State Appellate Defender, of Springfield, for appellant.

Neil F. Hartigan, Attorney General, of Springfield (Roma Jones Stewart, Solicitor General, and Mark L. Rotert and Ellen M. Flaum, Assistant Attorneys General, of Chicago, of counsel), for the People.

JUSTICE RYAN delivered the opinion of the court:

The defendant, Willie Enoch, was charged under an indictment with four counts of murder (Ill. Rev. Stat. 1983, ch. 38, par. 9-1(a)), and one count each of aggravated kidnapping (Ill. Rev. Stat. 1983, ch. 38, par. 10-2), attempted rape (Ill. Rev. Stat. 1983, ch. 38, par. 8-4),

and armed robbery (Ill. Rev. Stat. 1983, ch. 38, par. 18-2). Following a jury trial in the circuit court of Peoria County, Enoch was acquitted on the charges of armed robbery and murder in the course of armed robbery, but was convicted of all other charges. He waived a jury at the death penalty hearing, and the circuit judge found the defendant eligible for the death penalty on the basis of the two felony-murder convictions: murder in the course of attempted rape and murder in the course of aggravated kidnapping (Ill. Rev. Stat. 1983, ch. 38, par. 9-1(b)(6)). The judge found no mitigating factor sufficient to preclude imposition of the death penalty, and sentenced the defendant to death. The sentence was stayed pending direct appeal to this court. Ill. Const. 1970, art. VI, §4(b); 107 Ill. 2d R. 603.

The victim, Armanda Kay Burns, was a 25-year-old housekeeping supervisor employed by the Methodist Medical Center in Peoria. She lived in a basement apartment near the medical center. On April 22, 1983, several members of the housekeeping staff, including the victim, were gathered in the victim's office at the hospital at about 11:30 p.m. All were working the 3 p.m. to 11:45 p.m. shift. Three staff members testified that the defendant entered the office and asked where his brother was. They also saw the defendant speaking with the victim. As two of these witnesses left the hospital at the end of the work shift, they saw the victim and the defendant walking together toward her apartment. One witness testified that he saw them within 100 feet of the victim's dwelling and that she waved at him when he blew his horn.

Derek Proctor testified that the victim had been his girlfriend for about eight months. On April 22, 1983, they had plans to go out with the victim's brother and sister-in-law after the victim finished work. Proctor arrived at the victim's apartment about midnight and rang the doorbell several times. Receiving no response, he waited 5 to 10 minutes and then walked to the hospital, where he asked a security guard to check whether the victim was still there. When told she was not, Proctor called her apartment from the hospital but got no answer. He then returned to the apartment, rang the doorbell again. Receiving no answer, he walked across the street to buy a pack of cigarettes. He returned to the apartment a few minutes later, rang the doorbell again several times. Getting no response, he sat down on the curb to wait.

A few minutes later, at about 12:45 a.m., he heard the door open. He turned and saw the defendant, wearing a blue pin-striped coat and carrying a white shirt in his hands, coming out. Proctor asked the defendant if the victim was in her apartment and the defendant replied that she was. Proctor rang the doorbell again and, receiving no response, ran after the defendant, whom he saw running across a field near the medical center. Proctor testified that he recognized the defendant as the person who had come to the victim's door the previous night asking to use the telephone while Proctor was watching television.

Proctor returned again to the apartment and knocked on all the windows. He saw that lights were on in the kitchen and bedroom. After looking unsuccessfully for the defendant at several clubs in the

area, he went to the home of the victim's brother, and he was accompanied back to the apartment by her brother and sister-in-law, arriving at about 2:15 a.m. They knocked at the door, and receiving no answer, kicked in the basement window. They saw the apartment in disarray and the victim's body on the bedroom floor. A hospital security guard and the Peoria police who were summoned testified that they observed the victim with her hands bound behind her back with wire, a laceration across her throat, numerous stab wounds in her chest, and a cut from her sternum to her pubic bone. An autopsy revealed that the cause of death was a stab wound in the victim's back.

Louise Pate, the defendant's girlfriend, testified that in the early morning of April 23, 1983, the defendant returned to their apartment, went into the

bathroom and turned on the water. He then left the apartment to get some cigarettes. When he returned he told her that he had killed Kay Burns that night. He said the he had "cut her throat and heart out," and that on the way out of their apartment he had bumped into the victim's boyfriend. The defendant told Pate that he had just burned the pants he had been wearing in an incinerator outside.

After the trial had started, defendant moved to suppress statements he had made following his arrest. Detective Charles Cannon testified at a suppression hearing that, after he arrested the defendant at Pate's apartment, the defendant was taken to the Peoria police department, where he was interviewed by Detective Sammie Hoskins and himself. While he was being read his *Miranda* rights, the defendant requested an attorney. Detective Cannon continued

reading the *Miranda* warnings and, when he finished, asked whether the defendant understood his rights. The defendant said he did and he still wanted an attorney. Detective Cannon told defendant that no more questions would be asked and that he would explain the procedure for obtaining an attorney. He then told the defendant that he would be taken to the county jail and booked for murder. The defendant asked whose murder he was being charged with and the officer told him the murder of Kay Burns. The defendant replied, "Oh no, not Kay Burns," and told the officers he had seen her at the hospital the night before, had walked with her to within a block of her apartment, and had then gone home. The officer then told defendant that a witness had seen him leaving her apartment, and again stated that no questions would be asked of defendant. The circuit court

found that the defendant's statements were voluntary utterances, and not the result of questioning or its functional equivalent. The court therefore denied the defendant's motion to suppress the statements, and Officer Hoskins testified to the statements at trial.

Following the suppression hearing, the State made an offer of proof, asking that evidence of other crimes unrelated to the murder of Kay Burns be admitted to show that the defendant had the "intent and design" to commit rape against the victim. Over defense objections, the court admitted evidence concerning two prior incidents. As to the first, Louella Burnside testified that on March 6, 1983, the defendant raped her. She said that having locked herself out of her apartment at about 4 a.m., she was walking in her neighborhood looking for her husband, who had her keys, when she met

the defendant. He pulled a knife, stabbed her in the back, pulled her into a garage, threatened to cut her throat, told her to remove her clothes, and then raped her. After raping her, he told her he would tie her hands behind her back loosely so that she could escape after a few minutes. He then ripped her jacket and used it to tie her hands and gag her. After the defendant left, she escaped and called the police. She identified an army fatigue jacket recovered in Pate's apartment as the one defendant was wearing on the night of the incident.

Marilyn McClain testified to a second incident in which the defendant knocked at her door and asked where his brother lived. When she said she did not know, he asked for a glass of water. As she returned the glass to the kitchen, the defendant entered the apartment and locked the door. He

approached her with a pocket knife and cut her stomach, placed her on the couch and tied her hands behind her back and gagged her with a towel he had ripped up. He asked if there was any money in the apartment and whether she "had her period." While he was searching the apartment, she got her hands free and ran to the door, calling for help from her neighbor. The neighbor testified that, hearing McClain's screams, she looked out of her apartment and saw the defendant running down the stairs.

The defendant did not take the stand. The defense presented testimony that the defendant was wearing a different shirt from the one he was alleged to have worn on the night of the incident; that Proctor, the victim's boyfriend, had told a hospital security guard at about 12:10 a.m. on the night of the incident that there was a

window broken at the victim's apartment and that he had seen a man leaving her apartment; and that Pate, the defendant's girlfriend, had told the defendant's mother that she wanted to change her grand jury testimony implicating the defendant and had contacted a person for legal advice regarding the penalty for perjury. The jury found the defendant guilty of murder, aggravated kidnapping, and attempted rape, and of two counts of felony murder based on the aggravated kidnapping and attempted rape charges.

Defendant raises numerous issues before this court, including that his kidnapping conviction was improper because the same act which comprised the aggravated kidnapping was also one of the two acts which comprised the attempted rape; that the prosecutor's opening argument was improper; that defendant did not knowingly

and intelligently waive his right to a jury sentencing; and that the trial court erred by erroneously admitting evidence of a prior rape and a prior attempted rape, by excluding a paragraph of the pattern jury instructions, by allowing a police detective to assist the State in selecting the jury, and by finding that the defendant presents a clear and present danger in prison.

Since defendant failed to file a post-trial motion as required by the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1985, ch. 38, par. 116-1), the State argues that these issues have been waived. We have often stated the general rule that the failure to raise an issue in a written motion for a new trial results in a waiver of that issue on appeal. (*People v. Shum* (1987), 117 Ill. 2d 317; *People v. Szabo* (1986), 113 Ill. 2d 83, 93; *People v.*

Porter (1986), 111 Ill. 2d 386, 399; *People v. Caballero* (1984), 102 Ill. 2d 23, 31.) We stated the reasons for the waiver rule in *Caballero*:

> "Failure to raise issues in the trial court denies that court the opportunity to grant a new trial, if warranted. This casts a needless burden of preparing and processing appeals upon appellate counsel for the defense, the prosecution, and upon the court of review. Without a post-trial motion limiting the consideration to errors considered significant, the appeal is open-ended. Appellate counsel may comb the record for every semblance of error and raise issues on appeal whether or not trial counsel considered them of any importance." 102 Ill. 2d 23, 31-32.

The dissent (122 Ill. 2d at 204-06 (Simon, J., dissenting)) insists, as defense counsel often do, that it is not necessary, in order to preserve a question for review, that there be both an objection to the evidence at trial and a written post-trial motion raising the question of the objected-to evidence. The dissent

argues that it is sufficient if the issue is raised *either* during trial *or* in a post-trial motion. This is not the law in this State. *Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial. The dissent cites *People v. Black* (1972), 52 Ill. 2d 544, 551, and *People v. Needham* (1961), 22 Ill. 2d 258, 259, as holding that the absence of both a trial objection and a post-trial motion constitutes waiver. This assertion simply inverts the holdings of those cases, which is that the presence of both a trial objection and a written post-trial motion raising the issue are necessary to preserve an issue for review. This court stated in *People v. Carlson* (1980), 79 Ill. 2d 564, 577, and *People v. Roberts* (1979), 75 Ill. 2d 1, 11, the reason for the waiver rule when no

objection to the alleged error was made during trial.

The requirement that the alleged error be included in a post-trial motion has a different basis from the requirement that an objection be made at trial. The requirement for a written post-trial motion is statutory, and the statute requires that a written motion for a new trial *shall* be filed by the defendant and that the motion for a new trial *shall* specify the grounds therefor. (Ill. Rev. Stat. 1983, ch. 38, par. 116-1.) A written motion for a new trial may include not only alleged trial errors and errors in instructions that have been properly preserved by timely objection, but also other grounds for a new trial such as newly discovered evidence. Failure to specify grounds for a new trial in writing in a motion for a new trial has been held by this court to constitute

waiver of the issue on the review in the absence of plain error. (*People v. Pickett* (1973), 54 Ill. 2d 280.) Simply because an objection to evidence may have been made during the trial does not justify ignoring the clear mandate of the statute that the question be set forth in writing in the motion for a new trial.

The dissent has read section 116-1 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 116-1) as not requiring the filing of a written motion for a new trial. The dissent contends that this section of the Code "merely mandates the timing and the contents of a motion for those who choose to file a motion for a new trial." (122 Ill.2d at 207 (Simon, J., dissenting).) This is a strained construction of the statute. There is no authority supporting this position. Prior to 1963, a motion for

a new trial was not required when the trial was before the court and not a jury, but the language of section 116-1 has changed the law in that respect and a written motion for a new trial is not required in both jury and nonjury cases. See Leighton, *Post-Conviction Remedies in Illinois Criminal Procedure*, 1966 U. Ill. L.F. 540.

It has been held that the requirement of a written motion can be waived if a defendant makes an oral motion for a new trial and the State does not object. The defendant may then avail himself of any ground for a new trial which might appear in the record. This apparent circumvention of the requirement that the motion for a new trial be in writing and specify the grounds is based on the concept of waiver. Since the State failed to object to the oral motion, it has waived the requirements of the statute. (*People*

v. Flynn (1956), 8 Ill. 2d 116, 118-20.) However, when no motion for a new trial is made, the first opportunity that the State has to object to the defendant's failure to comply with the statute is when the defendant raises issues on appeal.

In *People v. Irwin* (1965), 32 Ill. 2d 441, the defendant had not raised in his motion for a new trial any of the questions raised on review. This court held all of those questions were waived. The court noted that requiring the defendant to specify alleged errors in a motion for a new trial may save the delay and expense inherent in an appeal. The requirement also focuses the attention of the trial judge upon those aspects of the proceedings of which the defendant complains. The court concluded: "In short, we believe this waiver rule a salutary one serving a legitimate State interest in that it tends

to eliminate unnecessary reviews and reversals." *People v. Irwin*, 32 Ill. 2d at 444.

The dissent further contends that our construction of section 116-1 conflicts with our Rule 366. There is not such conflict. Rule 366 relates to civil appeals. Rule 612 lists the civil appeal rules which apply to criminal appeals. Rule 365 and Rule 367 are listed as applying to criminal appeals. However, Rule 366 is not. The dissent points out that in *People v. Lilly* (1974), 56 Ill. 2d 493, *People v. Murrell* (1975), 60 Ill. 2d 287, and *People v. Scott* (1977), 69 Ill. 2d 85, this court applied Rule 366 to criminal appeals.

The above three criminal cases, which applied Rule 366, all were concerned with the power of a reviewing court and entered orders under Rule 366(a). The powers

enumerated in Rule 366(a) for civil appeals are similar to those set out in Rule 615(b), which pertains to criminal appeals. In fact, in *People v. Scott*, this court noted that in *People v. Lilly*, Rule 366 was applied in vacating an incomplete judgment in a criminal case, and in *Scott*, we followed *Lilly*. However, we also stated in *Scott* that the authority for such an order as was entered could also be found under Rule 615(b).

Rule 366(b), which the dissent would have us apply in this case, relates to the scope of review in civil cases. The dissent has cited no case in which Rule 366(b) has been applied to a criminal appeal. The counterpart in criminal cases to the provisions of Rule 366(b), which pertains to the scope of review in civil cases, is found in Rule 615(a). That rule provides that any error, defect,

irregularity or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trail court. (87 Ill. 2d R. 615(a).) Thus, under Rule 615(a), the only time, in a criminal appeal, that a court of review may apply the broad scope of review pertaining to civil appeals found in rule 366(b)(3)(ii), as the dissent would have us do (neither the filing of, nor the failure to file a post-trial motion, limits the scope of review), is when plain error is involved. This is in accord with the holding of this opinion wherein, as we set out below, plain error is one of the three exceptions to the waiver rule in criminal cases where no motion for a new trial has been filed.

Our constitution requires that this court review all cases in which a sentence of death is imposed. (Ill. Const. 1970, art. VI, §4(b).) However, our constitutional obligation to review death penalty cases does not require us to review every issue raised on appeal when the issues are not properly preserved by an objection in the trial court and a written post-trial motion. In *Porter* and *Caballero* this court noted that although death penalty cases are required by our constitution to be reviewed by this court, trial counsel nonetheless has an obligation to see that the statute requiring a post-trial motion is complied with so that the review will be limited to issues of some significance. Although we have not heretofore defined the limits of such a review, we now hold that when the defendant fails to comply with the statutory

requirement to file a post-trial motion, our review will be limited to constitutional issues which have properly been raised at trial and which can be raised later in a post-conviction hearing petition (Ill. Rev. Stat. 1983, ch. 38, par. 122-1), sufficiency of the evidence, and plain error. By limiting our review in cases where no post-trial motion is filed, we will promote judicial economy and finality of judgments. We will, at the same time, be protecting the integrity of the judicial system and the rights of criminal defendants.

The dissent characterizes our defining of the extent of our review of capital cases in the absence of a written motion for a new trial as "new" and "unprecedented" and as having been without warning. Quite to the contrary, the procedure we outline is in fact an

expansion of the right of review previously allowed by this court when no written post-trial motion has been filed. As stated in *People v. Pickett* (1973), 54 Ill. 2d 280, such a failure has, in the past, constituted waiver, except in cases involving plain error. The dissent relies upon *People v. Porter* (1986), 111 Ill. 2d 386, and *People v. Caballero* (1984), 102 Ill. 2d 23, as "at least implicitly recognizing that [the court's] constitutional duty to review capital cases was of greater import than the waiver doctrine." (122 Ill. 2d at 205 (Simon, J., dissenting).) In *Caballero* (a capital case), no post-trial motion was filed, and the court did not deny review because of a constitutional provision for automatic review by this court in death penalty cases. (Ill. Const. 1970, art. VI, §4(b).) However, this court stated that regardless

of our duty to review such cases, trial counsel has the obligation to comply with the statutory requirements with regard to written post-trial motions, and indicated that review should be limited to issues of some significance. Clearly, *Caballero* cannot be viewed as giving an assurance to convicted defendants of the right of unlimited review in all capital cases, when no post-trial motion has been filed. Rather, it should be viewed as a warning that post-trial motions should be filed in such cases and that review should be limited to "issues of some significance."

People v. Porter, which was also cited by the dissent, is not in point, because in that case a post-trial motion was filed. The motion raised the general issue of whether the defendant was denied a fair trial by an impartial jury, and referred to the presence on the jury of a

woman who attended the same church as the mother of the victim but did not question the adequacy of the *voir dire* examination of the jury. In *Porter*, this court again warned that in spite of its constitutional duty to review capital cases, trial counsel continues to have the obligation to comply with the statutory provisions governing motions for a new trial. In view of the warnings of *Caballero* and *Porter* and the previous holding of *People v. Pickett*, it cannot be said that the limits of review in capital cases, announced in this case, where no post-trial motion is filed, is "without warning" or is "new and unprecedented," as characterized in the dissent.

Turning now to the issues that fall within these categories, defendant argues that the admission into evidence of statements he made to the police officer

after he requested an attorney violated his fifth amendment privilege against self-incrimination. The State responds that defendant's statements were properly admitted because they were voluntary utterances and not the result of interrogation.

It is undisputed that during the reading of his *Miranda* rights and again afterwards, defendant requested an attorney. After reading all of the *Miranda* warnings, the interrogating officer told defendant that he would explain the procedure for obtaining an attorney.

It is not clear from the record the sequence in which the various statements were made by the officer and by the defendant. The officer testified that at the conclusion of the *Miranda* warnings the defendant stated he still wanted an attorney. In explaining the procedure for

getting an attorney, the officer told the defendant that he would be taken to the Peoria County jail and booked for murder. The defendant then asked whose murder and the officer told him the murder of Kay Burns. The officer testified that the defendant then stated, "Oh no, not Kay Burns," and proceeded to tell the officer that he, the defendant, saw her the prior evening and had walked to within about a block of her home with her. The officer stated he again said that he was not asking any more questions but that they had a witness who saw the defendant leaving the victim's apartment. This sequence as to the statements was repeated by the officer on cross-examination. However, from the testimony given by another officer, one may conclude that the defendant was told he was going to be booked for the murder of Kay Burns, and that they had a witness who had

seen him leaving her apartment, before the defendant stated, "Oh no, not Kay Burns." The defendant relies on this latter sequence of statements, contending that telling the defendant that the State had a witness who had seen him leaving the victim's apartment was the functional equivalent of interrogation and prompted the defendant to say, "Oh no, not Kay Burns." The defendant did not testify at the suppression hearing. Following counsel's arguments at the suppression hearing, the trial court concluded that neither *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, nor *Rhode Island v. Innis* (1980), 446 U.S. 291, 64 L. Ed. 2d 297, 100 S. Ct. 1682, preclude police from informing a defendant of the crime for which he was arrested and the reason for the arrest. The trial court did not discuss the difference in the evidence

concerning the sequence of the statements but found that the defendant's statements were voluntary utterances and not the result of police interrogation or its functional equivalent. The motion to suppress was denied, and at trial an officer testified regarding the defendant's statements.

Under *Miranda* and its progeny, once an individual states that he wants an attorney, all interrogation must cease until an attorney is present. (*Miranda v. Arizona* (1966), 384 U.S. 436, 473-74, 16 L. Ed. 2d 694, 723, 86 S. Ct. 1602, 1627.) "Interrogation" is defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980), 446 U.S.

291, 301, 64 L. Ed. 2d 297, 308, 100 S. Ct. 1682, 1689-90.) In the present case, informing the defendant that he was being booked for the murder of Kay Burns was clearly a police action "normally attendant to arrest and custody."

We find that the trial court's holding that the defendant's statements were voluntary utterances and not the product of police interrogation or its functional equivalent is supported by the evidence. The trial court, following argument of counsel at the suppression hearing, specifically referred to *Rhode Island v. Innis* and applied the "interrogation or its functional equivalent" test of that case. After reviewing the evidence at the suppression hearing in light of the *Innis* test, the court concluded that the defendant's statements were voluntary utterances and not the product of police

interrogation. We find that the holding of the trial court was not contrary to the manifest weight of the evidence. We will not therefore set aside the determination made by the fact finder. See *People v. Dalton* (1982), 91 Ill. 2d 22, 31.

It is not clear exactly what statements that were made by the defendant he seeks to suppress. The only specific utterances by the defendant made to the officer and argued at the suppression hearing and here were "Oh no, not Kay Burns" and the statement by the defendant that he had walked with her to within a short distance of her home. Regardless of the source of these utterances, the error in their admission, if any, must be considered to be harmless beyond a reasonable doubt. As shown by the evidence which establishes beyond a reasonable doubt that the defendant killed Kay Burns and

that he was walking with her within a block of her home on the night of the murder.

The defendant also argues that his conviction for aggravated kidnapping (Ill. Rev. Stat. 1983, ch. 38, par. 10-2) was not supported by sufficient evidence. Kidnapping occurs when a person knowingly and secretly confines another against his will. (Ill. Rev. Stat. 1983, Ch. 38, par. 10-1.) A kidnapper commits the offense of aggravated kidnapping when he inflicts great bodily harm or commits another felony upon his victim in the course of the kidnapping. (Ill. Rev. Stat. 1983, ch. 38, par. 10-2(a)(3).) Defendant argues that the elements of secrecy and confinement or restraint were not established by the evidence.

Defendant's position with regard to the secrecy element is that since witnesses saw him go to the victim's apartment with

her, and since he made no overt attempt to conceal the victim's location from anyone, there could be no secret confinement. This argument reflects a misunderstanding of the nature of the secret confinement required by our kidnapping statute. The secret confinement element of kidnapping may be shown by proof of the secrecy of either the confinement or the place of confinement. (*People v. Mulcahey* (1978), 72 Ill. 2d 282, 285; *People v. Kleba* (1982), 110 Ill. App. 3d 345, 357.) In the case before us, the evidence clearly supports the conclusion that the victim's confinement was secret. The victim was secretly confined as effectively in her own home as if defendant had transported her to some remote isolated place of confinement. (*People v. Mulcahey* (1978), 72 Ill. 2d 282, 285.) Moreover, there was sufficient evidence to support the conclusion that the place of

confinement was also secret. Although two witnesses saw the defendant and the victim walking toward her apartment, no one actually knew that they were in the apartment.

From the evidence previously detailed in this opinion, it appears that the victim's boyfriend, Derek Proctor, tried for a period of at least 45 minutes to ascertain if the victim was in her apartment. He rang the doorbell several times. He then went to the hospital to see if she had left work. He called her apartment from the hospital. He returned to the apartment and again rang the doorbell several times. After going across the street to purchase some cigarettes, he returned to the apartment and again rang the doorbell. It is evidence that at all times the defendant and the victim were in the apartment and that the defendant made

no response to the call or the ringing of the doorbell and permitted none. It was not until Proctor saw the defendant leaving the apartment building and asked him if the victim was in her apartment that the fact that she was there became known. In addition, although the victim's boyfriend expected to meet her at her apartment that night, when the victim did not respond to the doorbell her boyfriend thought that she might still be at work. We conclude that the evidence establishes that the victim was secretly confined.

Defendant next contends that there was insufficient evidence to prove that the victim was restrained by him in her apartment. We disagree. In addition to the evidence that the victim's hands were bound during the attack, there was also evidence that the victim's blood was found in several rooms in the apartment and on

the telephone, which supports the conclusion that the victim attempted to escape from the defendant and that she was prevented from doing so.

The dissent discusses at length the defendant's conviction of aggravated kidnapping and concludes "[t]hat the method by which murder was committed in this case required momentary confinement cannot, in my opinion, supply the basis for an aggravated kidnapping conviction." (122 Ill. 2d at 220 (Simon, J., dissenting).) Of course, it was never argued in the defendant's brief that the "momentary confinement" associated with the victim's murder could not form the basis for the aggravated kidnapping charge, nor was it argued that the asportation or confinement was incidental to or inherent in the substantive crime of murder. The defendant argued in this court that the victim's

restraint or detention made up a significant portion of the attempted rape offense, not the murder. The defendant further argued that he should not have been convicted of both attempted rape and aggravated kidnapping.

The evidence which we have outlined herein justified submitting the question of the defendant's guilt as to both crimes (aggravated kidnapping and attempted rape) to the jury, and supports the finding of guilt as to both offenses.

We do not argue with the logic of the dissent's contention that an aggravated kidnapping conviction should not be sustained where the asportation or confinement may constitute only a technical compliance with the statutory definition but is, in reality, incidental to another offense. We can decide that issue when the proper factual pattern is presented.

However, this is not such a case. It cannot be seriously argued that in every case where a victim is murdered or raped during a secret confinement the perpetrator is to be absolved of guilt as to the offense of kidnapping. The evidence detailed herein supports the conclusion that there was more than a simple detainment incidental to the murder or rape. This was a secret confinement which constituted kidnapping within the statutory definition (Ill. Rev. Stat. 1983, ch. 38, par. 10-1), and every attempt by the victim's boyfriend to contact her was thwarted.

The defendant next argues that his conviction for attempted rape was not supported by sufficient evidence, because the evidence did not prove beyond a reasonable doubt that defendant had specific intent to commit rape. In order

to sustain a conviction on the charge of attempted rape, proof of the specific intent to commit rape is essential. (*People v. Beason* (1975), 32 Ill. App. 3d 305, 307.) However, the requisite intent may be inferred from the circumstances of the assault. *People v. Triplett* (1970), 46 Ill. 2d 109, 112; *People v. Williams* (1984), 128 Ill. App. 3d 384, 396.

We conclude that the evidence presented was sufficient to support the finding of intent to commit rape. The evidence showed that the victim was disrobed from her waist down, that he hands were tied, and that her blouse and jacket were pulled down around her arms. In addition, there was evidence that the victim had been gagged. Evidence of an assault with concomitant disrobing of the victim is sufficient to support a conviction for attempted rape. *People v.*

Bonner (1967), 37 Ill. 2d 553, 562; *People v. Williams* (1984), 128 Ill. App. 3d 384, 396-97.

The dissent discusses at length evidence of other crimes which wad admitted at trial in connection with the charge of attempted rape. These alleged trial errors have not been discussed in this opinion because they have been waived by the failure to raise them in the post-trial motion. The admissions of this evidence did not constitute plain error, because, as noted above, there was sufficient evidence, in addition to the now complained-of evidence, to support the finding of intent to commit rape and the conviction for attempted rape. This other evidence of the defendant's intent to commit rape is not equivocal, as the dissent characterizes it. Such a characterization is rebutted by the evidence recited in the paragraph above.

Also, as to the defendant's conviction for attempted rape, we need not find McClain's testimony concerning a prior offense to be harmless error, as the dissent urges. Rather, since this question was not preserved in a post-trial motion, before the propriety of the admission of McClain's testimony can be considered on review, it must have constituted plain error. As noted above, it did not.

We need not consider alleged trial errors that were waived by the failure of the defendant to raise the issues at trial an to preserve them in a post-trial motion in light of the plain error doctrine. The evidence of defendant's guilt was overwhelming. We noted in *People v. Carlson* (1980), 79 Ill. 2d 564, 576:

> "A significant purpose of the plain error exception to the waiver doctrine is to correct any serious injustices which

> have been done to the defendant. It therefore becomes relevant to examine the strength or weakness of the evidence against him; if the evidence is close, there is a possibility that an innocent person may have been convicted due to some error which is obvious from the record, but not properly preserved. Thus, this court has held that where the evidence is closely balanced, a court of review may consider errors that have not been properly preserved for review. *People v. Howell* (1975), 60 Ill. 2d 117, 121; *People v. Pickett* (1973), 54 Ill. 2d 280, 283."

Justice does not require the application of the plain error doctrine under the facts of this case.

The same rationale applies to the defendant's argument that the court should have *sua sponte* given an instruction on the aggravated kidnapping lesser included offense of unlawful restraint. Defendant tendered no instruction on unlawful restraint. The general rule is that the court is under no obligation to give instructions not tendered. See *People v.*

Gaines (1981), 88 Ill. 2d 342, 366-67; *People v. Carlson* (1980), 79 Ill. 2d 564, 583-84.

The defendant relies on *Beck v. Alabama* (1980), 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382, which held that the sentence of death could not be imposed after a jury verdict of guilty of a capital offense when the jury was not permitted to consider a verdict of guilty of a lesser included noncapital offense, provided that the evidence would support such a verdict. The Supreme Court, in *Hopper v. Evans* (1982), 456 U.S. 605, 72 L. Ed. 2d 367, 102 S. Ct. 2049, explained its holding in *Beck* by saying:

> "Our holding in Beck, like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided." (*Hopper v. Evans* (1982), 456 U.S. 605, 611, 72 L.

Ed. 2d 367, 373, 102 S. Ct. 2049, 2052.)

The Court in *Hopper*, relying on *Roberts v. Louisiana* (1976), 428 U.S. 325, 49 L. E. 2d 974, 96 S. Ct. 3001, concluded that an instruction on a lesser included offense is impermissible absent evidence supporting a conviction of the lesser included offense. (456 U.S. 605, 611, 72 L. Ed. 2d 367, 373, 102 S. Ct. 2049, 2052.) The Court then noted that *Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. However, the Court further stated:

> "But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence." (Emphasis in original.) *Hopper v. Evans* (1982), 456 U.S. 605, 611, 72 L. Ed. 2d 367, 373, 102 S. Ct. 2049, 2053.

Under our statute, kidnapping requires a *secret confinement* of a person against his will. (Ill. Rev. Stat. 1983, ch. 38, par. 10-1.) Unlawful restraint requires only that a person knowingly, without legal authority, detains another. (Ill. Rev. Stat. 1983, ch. 38 par. 10-3.) Aggravated kidnapping is committed when a kidnapper inflicts great bodily harm upon the victim or commits the offense of kidnapping while armed with a weapon. (Ill. Rev. Stat. 1983, ch. 38, pars. 10-2(3), (5).) Thus, one major distinction between kidnapping and unlawful restraint is that kidnapping involves a secret confinement, whereas unlawful restraint involves merely detaining another without legal authority. There is just no evidence in this case that could support the finding that the defendant merely detained the victim. Her wrists were bound with wire, the defendant

did not respond to the telephone call or to the many ringings of the doorbell, and the trail of blood disclosed that the victim went from room to room where she was severely wounded. This secret confinement was aggravated by the fact that the defendant was armed with a knife and that he inflicted great bodily harm on the victim by stabbing her, cutting her throat, and opening her abdomen from her sternum to her pubic bone. Referring again to the Supreme Court's decision in *Hopper*, the Court there noted that under the Federal ruling, a lesser included offense instruction should be given only if the evidence would permit a jury rationally to find a defendant guilty of the lesser offense and acquit him of the greater. (*Hopper v. Evans* (1982), 456 U.S. 605, 612, 72 L. Ed. 2d 367, 373, 102 S. Ct. 2049, 2053.) Under the evidence in this case the

jury could not have rationally convicted the defendant of unlawful restraint and could not have rationally acquitted him of aggravated kidnapping. The trial court did not err in failing to sua sponte instruct the jury on the offense of unlawful restraint.

The defendant argues that the failure of his trial counsel to file a post-trial motion and his failure to preserve trial error for review constituted ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052, outlined a two-part test of ineffective assistance of counsel. The defendant must first show that his counsel's performance fell below an objective standard of reasonableness. However, counsel's performance of failing to meet the first aspect of this test will not be found to constitute ineffective

assistance under the Constitution unless it is shown to be prejudicial to the defendant. (*See People v. Gaines* (1984), (105 Ill. 2d 79, 92-93.) This court noted in *Gaines* that *Strickland* recognized that a court need not decide the performance component of an ineffective assistance of counsel claim before analyzing the prejudice component. (105 Ill. 2d 79, 92-93.) In *Gaines*, this court concluded that the challenged conduct of counsel, even if found to be unreasonable, was insufficient to show that there was a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. (105 Ill. 2d 79, 93-94.) In support of this conclusion, the *Gaines* court went on to note that the evidence of defendant's guilt and the aggravating circumstances was overwhelming. (105 Ill. 2d 79, 93-94.) In

People v. Albanese (1984), 104 Ill. 2d 504, relying on *Strickland*, this court noted that the benchmark for judging a claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied upon as having produced a just result.

This court, in determining claims of ineffective assistance of counsel since *Strickland*, has considered the claims in light of the strength of the evidence against the defendant and the possible prejudicial effect of the alleged defective representation. We have held generally that the defendant must show actual prejudice, and unless there is a reasonable possibility that but for counsel's errors the result would have been different, a new trial will not be granted. *People v. Guest* (1986), 115 Ill. 2d 72, 88-89; *People v.*

Free (1986), 112 Ill. 2d 154, 169; *People v. Weir* (1986), 111 Ill. 2d 334, 338-39; *People v. Albanese* (1984), 104 Ill. 2d 504, 525-27.

In view of the overwhelming evidence of the defendant's guilt, and of the aggravating circumstances, it cannot be reasonably contended that the results would possibly have been different but for the alleged substandard representation by counsel.

The defendant next raises a battery of constitutional challenges to Illinois' death penalty statute which have previously been considered and rejected. This court has held that the statute does not arbitrarily limit imposition of the death penalty to only those defendants who do not require special assistance in order to be fit for trial. (*People v. Hall* (1986), 114 Ill. 2d 376, 420; *People v.*

Stewart (1984), 104 Ill. 2d 463, 499-502.) Likewise, we have stated that the statute adequately ensures that aggravating factors relied upon be relevant or constitutionally permissible (*People v. Albanese* (1984), 104 Ill. 2d 504, 541), that the absence of mitigating factors need not be proved beyond a reasonable doubt (104 Ill. 2d 504, 541-42), that the sentencer need not find that the death penalty is "appropriate" (104 Ill. 2d 504, 536-38), and that the statute provides for adequate appellate review (104 Ill. 2d 504, 541). We continue to adhere to our previously stated positions on these issues.

The judgments of convictions and the sentences imposed by the circuit court of Peoria county are affirmed. The clerk of this court is directed to enter an order fixing Thursday, May 12, 1988, as the date on which the sentence of death entered in

the circuit court is to be carried out. the defendant shall be executed by lethal injection in the manner provided by section 119-5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 119-5). A certified copy of the mandate in this case shall be furnished by the clerk of this court to the Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of the institution wherein the defendant is confined.

Judgments affirmed.

JUSTICE CUNNINGHAM took no part in the consideration or decision of this case.

JUSTICE SIMON, concurring in part and dissenting in part:

With but one reservation, I concur in the court's decision to affirm the defendant's murder conviction. The question of whether the police officer's

conduct constituted the "functional equivalent" of interrogation within the meaning of *Rhode Island v. Innis* (1980), 446 U.S. 291, 64 L. Ed. 2d 297, 100 S. Ct. 1682, cannot be left to the fact finder, as the majority suggests. Whether the circumstances as found by the fact finder constitute interrogation is a legal question, and the majority appears to have abdicated its judicial responsibility for deciding that issue of law. But in light of the substantial evidence of the defendant's culpability, any error in admitting the statement at issue ("Oh no, not Kay Burns") must be deemed harmless beyond a reasonable doubt.

However, because I have strong convictions that imposition of the death penalty is improper in this case, I dissent. I believe that the majority's adoption of a new waiver rule both unfairly

punishes this defendant and impermissibly narrows this court's constitutional obligation to review all capital cases. Furthermore, as I understand them, the consequences that the majority attaches to the defendant's failure to file a post-trial motion are inconsistent with the court's previously stated position in *People v. Caballero* (1984), 102 Ill. 2d 23, and *People v. Porter* (1986), 111 Ill. 2d 386.

> "[In] a death penalty case, which under our constitution is automatically reviewed by this court (Ill. Const. 1970, art. VI, sec (b)), we must review the case whether or not a written motion for a new trial has been filed. Otherwise, the constitutional provision for an automatic appeal would be meaningless." *People v. Caballero* (1984), 102 Ill. 2d 23, 32.

In *Caballero*, the court attempted to circumscribe this constitutional obligation by suggesting that review was limited to

"issues of some significance," which trial lawyers *should* identify in a post-trial motion. (*People v. Caballero* (1984), 102 Ill. 2d 23, 32-33.) In *Porter*, the court similarly admonished trial counsel to comply with the post-trial motion statute. (*People v. Porter* (1986), 111 Ill. 2d 386, 399.) But in both cases, after admonishing counsel, this court proceeded to decide issues that had not been preserved in a post-trial motion, thereby at least implicitly recognizing that its constitutional duty to review capital cases was of greater import than the waiver doctrine or trial counsel's statutory obligation to file post-trial motions. This recognition is consistent with my previous observation that "few propositions have a longer pedigree in the common law of this State than that any irregularity not *expressly* waived in the trial of a capital

case must be heard on review. (*Nomaque v. People* (1825), 1 Ill. (1 Breese) 145, 149; see *People v. Fisher* (1930), 340 Ill. 216, 259.)" (Emphasis in original.) *People v. Free* (1983), 94 Ill. 2d 378, 435 (Simon, J., concurring in part and dissenting in part).

Here, without warning, the court has adopted a retroactive change in the rules of criminal procedure requiring defendant to have filed a post-trial motion in order to raise significant issues that do not fall within the court's new-and unprecedented-three way exception for certain constitutional issues, sufficiency of the evidence and plain error. (122 Ill. 2d at 190.) It strikes me as fundamentally unfair for the court to impose sanctions for the failure to file a motion in a case where the defendant did not and could not have known of the court's new sanctions at

the time the motion was to have been filed. What value there is in imposing sanction in these circumstances eludes me, but whatever it may be, it cannot be a value greater than that of the defendant's life.

Application of the court's new waiver rule is especially troublesome in light of the Supreme Court's recognition that "the penalty of death is qualitatively different from a sentence of imprisonment, however long." (*Woodson v. North Carolina* (1976), 428 U.S. 280, 305, 49 L. Ed. 2d 944, 961, 96 S. Ct. 2978, 2991.) As Justice Clark has noted, "[b]ecause the United States Supreme Court has stated that a sentence of death is qualitatively different, I believe these cases should be treated differently under the waiver rule." (*People v. Szaba* (1986), 113 Ill. 2d 83, 99 (Clark, C.J., dissenting).) Thus, I fail to understand, particularly in view of the special

constitutional provision for direct appeal to this court, why a meritorious claim should be lost on appeal in a capital case simply because defense counsel failed to file a post trial motion.

I dissent not only from the application of the court's new rule in this case, but to the new rule itself. Generally, the absence of a proper objection or motion at trial *and* the omission of the issue from a written motion for a new trial constitutes a waiver of that issue on appeal. (*People v. Black* (1972), 52 Ill. 2d 544, 551; *People v. Needham* (1961), 22 Ill. 2d 258, 259.) As the majority notes by quoting *Caballero*, the purposes of this waiver rule are straightforward. (122 Ill. 2d at 186, quoting *People v. Caballero* (1984), 102 Ill. 2d 23, 31-32.) Requiring a defendant to identify alleged errors to the trial

court enables that court to consider and correct its own errors and thereby eliminates the need for an appeal with its attendant delay and expense. This procedure also "gives to the reviewing court the benefit of the judgment and observations of the trial court" regarding the alleged errors. (*People v. Irwin* (1965), 32 Ill. 2d 441, 443-44.) That rationale for the waiver rule is satisfied if an issue is properly presented either during trial or in the post-trial motion except where a contemporaneous objection is required.

In this case, the defendant raises a question regarding the admission of evidence of prior offenses; an objection was made and the issue was fully argued in the trial court. The observations and explanations of the circuit judge are explained in the transcript of the trial.

Even though the goals of the waiver rule have been satisfied, this court states that it need not consider the issues raised on appeal because no post-trial motion was filed. Instead, the majority asserts that there is a separate rationale for applying the waiver doctrine in cases where the alleged error was brought to the attention of the trial court, but was not included in a post-trial motion. Relying on the post-trial motion statute (Ill. Rev. Stat. 1983, ch. 38, par. 116-1), which requires defendants who choose to file post-trial motions to do so within 30 days and to specify the grounds therefor, the majority concludes that defendants' rights to appeal are contingent upon compliance with that statute. But I respectfully suggest that the majority has confused the requirements of the post-trial motion statute by reading

more into the statutory language than is there. Section 116-1 provides:

> "Motion for New Trial. (a) Following a verdict or finding of guilty the court may grant the defendant a new trial.
>
> (b) A Written motion for a new trial shall be filed by the defendant within 30 days following the entry of a finding or the return of a verdict. Reasonable notice of the motion shall be served upon the State.
>
> (c) the motion for a new trial shall specify the grounds therefor."

I am unable to understand how the statute itself can be read to place any requirements or impose any penalties on defendants who prefer to seek appellate review immediately. As I read "shall" in sections 116-1(b) and (c), it merely mandates the timing and the contents of a motion for those who choose to file a motion for a new trial. Even if there were some ambiguity to section 116-1, the rule of lenity requires that this statute be

construed strictly in favor of the defendant. (*Busic v. United States* (1980), 446 U.S. 398, 406, 64 L. Ed. 2d 381, 389, 100 S. Ct. 1747, 1753.) Because we have often "recognized that a policy of lenity applies with respect to the interpretation of criminal statutes" (*People v. Haron* (1981), 85 Ill. 2d 261, 278), I find the construction the majority gives the statute even less acceptable.

Moreover, the majority's construction conflicts with our Rule 366, which this court has applied to criminal cases in the past. (See, e.g., *People v. Lilly* (1974), 56 Ill. 2d 493, 496 (applying Rule 366(a)); *People v. Murrell* (1975), 60 Ill. 2d 287, 292 (applying Rule 366(a)(5)); *People v. Scott* (1977), 69 Ill. 2d 85, 88 (applying Rule 366(a)).) In *Scott*, the court said: "Although Rule 366 is not specifically made applicable to criminal appeals (58 Ill. 2d

R. 612, in *People v. Lilly* (1974), 56 Ill. 2d 493, the court, citing Rule 366, held that it had authority to vacate an incomplete judgment entered on a verdict." (*Scott*, 69 Ill. 2d at 88.) These decisions applied only Rule 366(a), but there is no reason why Rule 366(b)(3)(ii) should not similarly be applicable to criminal cases. Specifically, Rule 366(b)(3)(ii) provides that in nonjury trials, "[n]either the filing of nor the failure to file a post-trial motion limits the scope of review." (50 Ill. 2d R. 366(b)(3)(ii).) Considering that the sentencing in this case was a nonjury proceeding, Rule 366(b)(3)(ii) should be applied to preclude the majority's novel interpretation of section 116-1.

Finally, I note that the majority's new waiver rule is not supported by its citation of *People v. Pickett* (1973), 54

Ill. 2d 280, for that case, just as the majority points out in distinguishing *People v. Porter* (1986), 111 Ill. 2d 386, "is not in point, because in that case a post-trial motion was filed." 122 Ill. 2d at 191.

In justifying this new waiver rule the majority purports to promote judicial economy. (122 Ill. 2d at 190.) But the economy of a reargument before the same authority is illusory. One can only expect perfunctory treatment of such post-trial motions given the trial court's perspective of relative costs. If the trial court erroneously accepts a defendant's request for a new trial, the cost of error is that of a new trial. Alternatively, if the motion is erroneously denied, the additional cost is only that of appealing the death sentence directly to this court, which in most cases is not as costly as a

new trial. Therefore, a trial judge should, if motivated solely by judicial economy, deny every motion for a new trial except those which are overwhelmingly meritorious. Since judicial economy preordains the outcome in virtually every motion for a new trial, the requirement of making the perfunctory post-trial motion is itself uneconomical.

Ironically, the court's new waiver rule, though a convenient tool with which to dispose of Enoch's contentions in this case, may well spawn a new breed of ineffective-assistance-of-counsel claims based on failure to preserve issues for appeal. Although this court in *Caballero* viewed the post-trial motion as valuable for the purpose of "limiting the consideration to errors considered significant" (102 Ill. 2d at 31), the court's ruling today likely will cause

trial counsel to burden trial courts with motions that argue every conceivable basis for a new trial. As I argued in my dissent in *Caballero*, 102 Ill. 2d at 52-53, defendants in capital cases should not be forced to make binding decisions regarding which issues to preserve for appeal without sufficient time to review the record thoroughly. If defendants are forced to make such hurried decisions, the results may be perverse. Because the post-trial motion statute itself (Ill. Rev. Stat. 1985, ch. 38, par. 116-1) places only time (and not substantive) constraints on post-trial motions, and because the new consequences that attach to failure to specify grounds for a new trial are so harsh, defense counsel will no longer be encouraged to do precisely what would save judicial resources -- spend time and weed out less promising arguments.

The record in this case reveals that following an offer of proof by the State and argument by counsel, the trial court found that evidence of prior offenses against the witnesses Burnside and McClain was admissible to show common design and the defendant's intent to commit rape, kidnapping, and armed robbery. The court informed the jury that the evidence would be admitted for a limited purpose, and later instructed the jury that the purpose was to show common design and criminal intent. On appeal the State argues that the evidence was properly admitted to demonstrate the defendant's *modus operandi* and intent. Purporting to find the plain error doctrine inapplicable, the majority refuses to consider whether the defendant's prior misconduct was properly admissible even though the evidence of attempted rape was exceptionally weak and the conviction

on that count or aggravated kidnapping was a necessary factor in imposing the death sentence on the defendant. Not only is the court's reliance on the waiver doctrine misguided, but its discussion of the plain error exception is flawed. The court concludes that admission of the evidence "did not constitute plain error, because, as noted above, there was sufficient evidence, in addition to the now complained-of evidence, to support the finding of intent to commit rape and the conviction for attempted rape." (122. Ill. 2d at 198.) I do not understand how the majority can conclude that the plain error doctrine is inapplicable simply because of its view that the evidence was sufficient to support defendant's conviction. "'[T]he doctrine of plain error may be invoked in criminal cases where the evidence is closely balanced or where the error is of

such a magnitude that the accused is denied a fair trial.'" (*People v. Friesland* (1985), 109 Ill. 2d 369, 375, quoting *People v. Black* (1982), 107 Ill. App. 3d 591, 593.) There is no requirement that defendant prove insufficiency of the evidence in order to invoke the plain error doctrine. In effect, the majority collapses the plain error inquiry into a mere question of whether the evidence was sufficient to support conviction. The determination whether an error constitutes a plain error that affects substantial rights (107 Ill. 2d R. 615(a)), however, has always been and should remain an inquiry independent of, and distinct from, an assessment of the sufficiency of evidence.

The general rule is that evidence of offenses not charged in the indictment on which a defendant is being tried is

inadmissible. (*People v. McDonald* (1975), 62 Ill. 2d 448, 455.) "The law distrusts the inference that because a man has committed other crimes he is more likely to have committed the current crime. And so, as a matter of policy, where the testimony has no value beyond that inference, it is excluded," (*People v. Lehman* (1955), 5 Ill. 2d 337, 342.) However, evidence that tends to prove a fact at issue -- such as motive, intent, identity or common design -- or to establish the defendant's identify as the perpetrator by his distinctive *modus operandi* is admissible for the limited purpose of proving that fact, even though that evidence also reveals the commission of a separate offense. *People v. Lindgren* (1980), 79 Ill. 2d 129, 137; *People v. McDonald* (1975), 62 Ill. 2d 448, 455.

In considering the admissibility of the prior-offenses evidence, the trial

court appears to have confused common design with *modus operandi*. A common design is a criminal scheme of which the crime charged is only one part. (*E.g.*, *People v. Brown* (1962), 26 Ill. 2d 308, 316; *People v. Steele* (1961), 22 Ill. 2d 142, 146; see generally 2 S. Wigmore, Evidence §304 (Chadbourn rev. ed. 1979) (proof of a scheme or design is used to prove the very doing of the act charged when such is at issue).) Since there is no evidence in the record of a larger criminal scheme than the crimes charged, and the prior offenses in question were separate from and unrelated to those crimes, the evidence was inadmissible on a common design theory.

A *modus operandi*, on the other hand, is a pattern of criminal behavior so distinctive that unrelated crimes are recognizable as the work of the same

person. Most often, establishing a *modus operandi*, in part through evidence of prior offenses, is useful in identifying the defendant as the perpetrator of the offense charged. Because of its potential prejudicial effect, evidence of prior unrelated offenses is admissible as proof of *modus operandi* "only upon a strong and persuasive showing of similarity" between those offenses and the crime charged. (*People v. Tate* (1981), 87 Ill. 2d 134, 141.) "Although the similarities need not be unique *** to the *** offenses being compared, there must be present some distinctive features that are not common to most offenses of that type in order to demonstrate *modus operandi*." 87 Ill. 2d 134, 142-43.

The primary crime with which the defendant was charged in this case was a vicious murder involving a post-mortem

mutilation of the victim's body. He was also charged with attempted rape, aggravated kidnapping, armed robbery, and three felony murder counts based on those three charges. The incident to which Burnside testified was a rape, and that to which McClain testified was an attempted armed robbery. Although the State maintains that the events involving McClain constituted attempted rape, her testimony does not support that contention except by unwarranted inferences. Thus, the prior offenses appear to be quite different from the offenses at issue here.

The State argues, however, that there are substantial similarities among the three incidents. The offenses occurred at approximately three week intervals, and the assailant in each incident initially approached each of the three victims in a nonthreatening manner. Each of the victims

had her hands bound behind her back with materials found at the site of the crime. Burnside and McClain were also gagged; evidence as to whether Burns was gagged was equivocal. Each of the three victims was cut in the course of the assault on her.

Notably absent from the State's analysis of the similarities among the three incidents is any distinctive feature common to those offenses that is not common to many such crimes. There is nothing so nearly identical in the methods used in these three incidents as to mark them as the work of the same person. Moreover, there are differences among the three incidents at least as substantial as the similarities pointed out by the State. For example, the victim here was murdered in her apartment after having been accompanied there from work by the defendant. Burnside was raped in a garage after having been

accosted by the defendant on the street. McClain was attacked in her apartment after having engaged in conversation with the defendant, who came to her door. Burnside and the victim were partially disrobed; McClain was not. Burnside was raped; the victim and McClain were not. McClain's assailant attempted to rob her; Burnside's did not. Although a knife was used in each of the three incidents, apparently it was not the same knife since the knife used in the Burn's murder was identified as a kitchen knife, and Mcclain stated that the defendant had a pocket knife. Burnside received a small cut in her back; McClain had a small cut in her stomach; the victim had her throat and face slashed, had a stab wound in the back, was repeatedly stabbed in the chest, and was cut open from her sternum to her pubic bone. The victim's hands were bound tightly with wire; both

Burnside's and McClain's hands were bound loosely, the latter's so loose that she was able to free her hands within a few minutes.

In sum, the three crimes share the single feature that in each instance the victim was injured by an assailant brandishing some type of knife. But the three crimes apparently were not committed with the same weapon (see *People v. Taylor* (1984), 101 Ill. 2d 508, 521), nor with the same criminal purpose. The three offenses in question were not "so nearly identical in method as to earmark them as the handiwork of the accused" (McCormick, Evidence §190, at 449 (2d ed. 1972)); thus, the prior-crimes evidence was, in my opinion, inadmissible to prove the identity of the perpetrator on a *modus operandi* theory.

The State argues that the prior-offenses evidence was admissible to establish defendant's intent to rape the victim and his guilt on the charge of attempted rape. Evidence regarding defendant's rape of Burnside was, I believe, properly admissible for that purpose. Although the defendant argues that Burnside's testimony only tends to prove his propensity to commit the crime charged, the evidence in fact tends to establish that in assaulting the victim he intended to rape her. The trial court received this testimony and issued a limiting instruction that it be considered to establish defendant's intent. That intent was the key issue on the attempted rape charge, an issue for which the Burnside rape had tangible probative value. *People v. Nye* (1951), 38 Cal. 2d 34, 37, 237 P.2d 1, 3 ("The evidence of the attempt

to rape Miss W. was clearly admissible to show that defendant's acts against Mrs. P. were committed with the intent to commit rape"); cf. *People v. Peyser* (1942), 380 Ill. 404 (in prosecution for criminal abortion, evidence of prior criminal abortions held admissible to establish criminal intent); see generally 2 S. Wigmore, Evidence §357 (Chadbourn rev. ed. 1979) ("former acts of the kind are relevant to negative the intent as being of any other kind than to commit rape").

McClain's testimony, however, was not probative of the defendant's intent to rape the victim. Whether the defendant would have raped McClain had she not escaped is entirely speculative; thus, the testimony should not have been admitted because its prejudicial potential outweighed its negligible tendency to establish a fact in controversy.

Nor was McClain's testimony admissible to establish intent on the armed robbery allegation. Unlike the attempted rape charge, the armed robbery count on which the defendant was acquitted did not allege an inchoate offense, so the most probative evidence of intent would have been proof of the completed offense. I *People v. Rogers* (1927), 324, Ill. 224, evidence of Rogers' prior crimes of taking indecent liberties was not admissible to prove the intent to commit indecent liberties in the case then at bar. "Such was shown by the act itself." (324 Ill. 224, 233.) Therefore, evidence of prior crimes to establish intent may only be admitted to establish intent for a completed offense where a defense is premised on lack of intent or knowledge. (*People v. Wilson* (1970), 46 Ill. 2d 376, 381; *People v. Fiorito* (1952), 413 Ill. 123, 131; see *United States v.*

Silvern (7th Cir. 1973), 494 F.2d 355, 360.) To hold otherwise would expand the contours of the intent exception to the boundaries of the general rule itself. *United States v. Miller* (7th Cir. 1974), 508 F.2d 444, 450 ("Since intent is always an issue, it would emasculate the rule to hold that evidence of other crimes may always be admitted to show criminal intent").

Because of this unduly prejudicial and improperly admitted evidence, the defendant's conviction for attempted rape should be reversed and that portion of the case remanded for a new trial. The evidence of defendant's intent to rape the victim is simply too equivocal for the admission of McClain's testimony to be regarded as harmless error.

In reliance upon its waiver analysis, the majority opinion also rejects the

defendant's contention that he should not have been convicted of aggravated kidnapping because he did not confine the victim to any extent greater than that inherent in the other crimes charged. Aggravated kidnapping occurs when "[a] kidnapper within the definition of paragraph (a) of Section 10-1 *** [c]ommits the offense of kidnapping while armed with a dangerous weapon." (Ill. Rev. Stat. 1983, ch. 38, par. 10-2(a)(5).) Section 10-1 includes within the definition of kidnappers "a person [who] knowingly *** [a]nd secretly confines another against his will." (Ill. Rev. Stat. 1983, ch. 38, par. 10-(a)(1).) Rather than merely accepting the fact of secret confinement to establish that element of aggravated kidnapping, the defendant argues that the secret confinement must be of substantial duration. Otherwise, the defendant argues,

crimes such as murder, rape and robbery would frequently fall within the broad statutory definition because some confinement is virtually inherent in those crimes.

In *People v. Levy* (1965), 15 N.Y.2d 159, 204 N.E.2d 842, 256 N.Y.S.2d 793, the New York Court of Appeals considered this question in a case where the victims had been robbed in their automobile while it was driven some 27 city blocks. The New York court decided that the asportation involved was merely incidental to the robbery. "In essence the crime remained a robbery although some of the kidnapping statutory language might literally also apply to it." (15 N.Y.2d 159, 165, 204 N.E.2d 842, 844, 256 N.Y.S.2d 793, 796.) Concerned that prosecutors might take advantage of broadly drafted kidnapping statutes to expose defendants to more

severe criminal sanctions than their actions and intentions warranted, the court of appeals limited the broad statutory definition of kidnapping then in effect to embrace only "'kidnapping' in the conventional sense in which that term has now come to have acquired meaning." (15 N.Y.2d 159, 164-65, 204 N.E.2d 842, 844, 256 N.Y.S.2d 793, 796; see *People v. Lombardi* (1967), 20 N.Y.S.2d 266, 229 N.E.2d 206, 282 N.Y.S.2d 519.) The restrictive definition of kidnapping adopted in New York has found acceptance in other States. See *People v. Daniels* (1969), 71 Cal. 2d 1119, 459 P.2d 225, 80 Cal. Rptr. 897; *People v. Adams* (1973), 389 Mich. 222, 205 N.W.2d 415; *Wright v. State* (1978), 94 Nev. 415, 581 P.2d 442; *State v. Wilder* (1971), 4 Wash. App. 850, 486 P.2d 319; see also *State v. Buggs* (1976), 219 Kan. 203, 547 P.2d 720; but see *Samuels v.*

State (Del. 1969), 253 A.2d 201; *Lester v. State* (1970), 9 Md. App. 542, 266 A.2d 361; *State v. Morris* (1968), 281 Minn. 119, 160 N.W.2d 715; *State v. Ginardi* (1970), 111 N.J. Super. 435, 268 A.2d 534.

This court considered the *Levy* rule in *People v. Canale* (1972), 52 Ill. 2d 107, where the victim had been forced to drive to a vacant lot where she was then raped. Recognizing that the "apparent rationale and purpose of *Levy* was to prevent, in an excess of prosecutorial zeal, the elevation of the lesser crimes, under New York law, of rape and robbery to the more serious crime of kidnapping," the court affirmed Canale's conviction for aggravated kidnapping because the penalty for aggravated kidnapping, an indeterminate sentence of at least two years, was at that time less severe than those provided for rape and robbery. 52 Ill. 2d 107, 118.

Since *Canale*, however, the penalty for aggravated kidnapping has been greatly increased; aggravated kidnapping, other than for ransom, is now punished as a Class 1 felony, for which the sentence may range from 4 to 30 years' incarceration. (Ill. Rev. Stat. 1983, ch. 38, pars. 10-2(b)(2), 1005-8-1(a)(4), 1005-8-2(a)(3).) The appellate court has reacted to the relatively greater sanction now imposed for aggravated kidnapping. In *People v. Smith* (1980), 91 Ill. App. 3d 523, 529, the court identified four factors to be considered when deciding whether an incident of asportation or secret confinement as part of another crime rises to the level of statutory kidnapping:

> "'(1) [T]he duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the

> separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.' *Government of the Virgin Islands [v. Berry* (3d Cir. 1979)], 604 F.2d 221, 227."

The interpretation of aggravated kidnapping accepted by the majority in this case is even more critical than where a greater period of incarceration results from the kidnapping conviction. The question here is whether a defendant should be sentenced to death for murder because the prosecutor argued that the short period of detention which accompanies many murders fits the statutory definition of aggravated kidnapping one of the aggravating factors that may trigger imposition of the death penalty in Illinois (Ill. Rev. Stat. 1983, ch. 38, par. 9-1(b)(6)). This very problem was anticipated by the drafters of the Model Penal Code: "Examples of abusive prosecution for kidnapping are common.

Among the worst is use of this means to secure a death sentence." (Model Penal Code §212.1, Comments (Tent. Draft No. 11, 1960).) In cases of murder, rape or robbery in which a detention or asportation occurs incidentally to the substantive crime, and the detention or asportation thereby does not materially increase the victim's peril, a conviction for kidnapping or aggravated kidnapping is purely redundant and should not be used to justify the imposition of capital punishment. It is absurd to conclude that "[t]he criminalogically non-significant circumstance that the victim was detained or moved incident to the crime" was intended by the General Assembly to "determine[] whether the offender lives or dies." Model Penal Code §212.1, Comments (Tent. Draft No. 11, 1960).

The court should take this opportunity to distinguish between asportations and secret confinements that are merely incidental to an underlying forcible felony and those that in fact implicate the separate dangers kidnapping statutes address. It has been suggested in the Model Penal Code that the distinction is a matter of time or distance, and the Code resolves the matter by requiring a "substantial" asportation or period of confinement to charge kidnapping. But that distinction ignores what I view as the real harm that differentiates kidnapping from unlawful restraint: that by carrying the victim away or secreting the victim, the victim is not only confined but also dispossessed of legal and societal protection - as though the victim had been sold into slavery (*Exodus* 21:6) or removed from the country of citizenship (see 4 W.

Blackstone, Commentaries 219). Given the evil peculiar to kidnapping, it follows that it is the act of denying those protections in addition to perpetrating an act of murder, rape or robbery, and not merely the duration of the secret confinement, that suggests a kidnapping has been committed.

I believe that the intention of the General Assembly and the interests of criminal justice are best served by excluding from the statutory definition of kidnapping an asportation or confinement that occurs incidentally to another forcible felony; a denial of legal and societal protections is assumed to occur during the time an independent crime is being perpetrated against the victim. Of course, "it is the rare kidnapping that is an end in itself; almost invariably there is another ultimate crime." (*People v.*

Miles (1969), 23 N.Y.2d 527, 540, 245 N.E.2d 688, 695, 297, N.Y.S.2d 913, 922.) Therefore, I suggest that if the asportation or confinement in a particular case is not inherent in the substantive crime, but substantially facilitates the commission of that other offense and enhances the risk to the victim, then a conviction for kidnapping could be affirmed.

As the jury found, the crime in this case was essentially murder in that the defendant stabbed the victim knowing that the wounds he inflicted created a strong probability of death. The murder might as effectively have been accomplished at a distance with poison or even a gun, and the defendant would clearly not be guilty of kidnapping. That the method by which murder was committed in this case required momentary confinement cannot, in my

opinion, supply the basis for an aggravated kidnapping conviction. The heinous nature of the victim's death may support an extended sentence, but it should not be contorted to shape a statutory aggravating factor supporting a capital sentence. Compare Ill. Rev. Stat. 1983, ch. 38, par. 1005-5-3.2(b)(2) with Ill. Rev. Stat. 1983, ch. 38, par. 9-1(b)(7).

Thus, because I would reverse the defendant's convictions for both attempted rape and aggravated kidnapping, I cannot join in the majority's decision to affirm the defendant's sentence of death. Without a proper conviction for one of the felonies included as aggravating factors in our death penalty statute (Ill. Rev. Stat. 1983, ch. 38, par. 9-1(b)(6)(c)), the death sentence cannot be imposed in this case. Moreover, I continue to adhere to my opinion that the Illinois death penalty

statute is unconstitutional. (See *People v. Lewis* (1981), 88 Ill. 2d 129, 179 (Simon, J., dissenting). See also *United States ex rel. Lane v. Lewis* (C.D. Ill. Jan. 8, 1987), No. 86-2086, slip op. at 29 (expressing "grave doubt" over the constitutionality of the Illinois death penalty statute).) In fact, the constitutional problems set forth in the dissent in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, 544-45, that "the statute contains no guidelines to prevent the arbitrary exercise of discretion by the State's Attorney," are exacerbated by the majority's decision. By upholding a death sentence based in part on an expansive definition of aggravated kidnapping, the court expands the prosecutor's discretion and thereby heightens my objections that the death penalty statute violates both article II, section 1, of the Illinois

Constitution and the eighth amendment to the United States Constitution.

APPENDIX E

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT
PEORIA COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	Case No. 83 CF 1401
WILLIE EARL ENOCH,	)	
Defendant.	)	

JURY TRIAL

REPORT OF PROCEEDINGS of the Voir Dire of the Jury Trial had before the Honorable DONALD C. COURSON, Judge, on the 14th day of November, 1983.

APPEARANCES:

MR. JOHN BARRA, State's Attorney of Peoria County, and

MR. ROBERT GAUBAS, First Assistant State's Attorney, for The People of the State of Illinois;

MR. THOMAS PENN, Public Defender of Peoria County, by

MR. MARK ROSE, Assistant Public Defender, for the defendant.

Cynthia L. Newman, CSR, RPR
Official Court Reporter
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Peoria County Courthouse
Peoria, IL 61602

THE COURT: Let the record show this is Case 83 CF 1401, entitled the People of the State of Illinois vs. Willie Earl Enoch on a charge by Indictment of murder in Count 1, same charge in Counts 2, 3, 4, charged with armed robbery in Count 5, aggravated kidnapping in Count 6, and attempt rape in Count 7.

Are you the defendant, Willie Earl Enoch?

THE DEFENDANT: Yes, I am.

THE COURT: The defendant is present in person, accompanied by his attorney, Mr. Mark Rose.

The People are present by John Barra, State's Attorney, and Robert Gaubas, First Assistant State's Attorney.

Cause was set for jury trial today. Are the People ready to proceed to trial?

MR. BARRA: Yes, sir, your, Honor.

THE COURT: Is the defendant ready?

MR. ROSE: Yes, sir.

THE COURT: There were a couple of matters that the Court thought proper to address for the record before we commenced with jury selection. First, that it's come to the Court's attention that the People may call a witness named Derek, D-e-r-e-k, Proctor; address that the Court has been given is 1825 Butler, Peoria, Illinois. It, also, has come to the Court's attention that that witness for the People, or proposed witness for the People, has previously been represented in a felony matter by attorney for the defendant, Mr. Rose.

Is that correct, Mr. Rose?

MR. ROSE: Yes, sir.

THE COURT: And, I believe, the Certified Copy of the Conviction in that case indicates it was a matter that transpired back in 1979; is that correct?

MR. ROSE: Yes, sir.

THE COURT: Mr. Rose, do you feel that the existence of your prior relationship with this proposed witness would cause you any difficulty insofar as your representation of the defendant, Willie Earl Enoch?

MR. ROSE: I don't believe so, your Honor.

THE COURT: Has there been an ongoing relationship of attorney-client between you and Mr. Proctor?

MR. ROSE: Only that I believe Mr. Proctor has been in the office, and I believe it is since the date of this, although I can't be sure, concerning possibly hiring me to represent him in matters. But so far as I recall, never represented him privately, and, I believe, this may this may be the only occasion that, in fact, I represented him.

THE COURT: There is no attorney-client relationship; is that right?

MR. ROSE: That's correct.

Q To the best of your recollection -- I don't mean to put words in your mouth -- but my understanding is, to the best of your recollection, your attorney-client relationship with Mr. Proctor ended with the conclusion of this 1979 case; is that right?

MR. ROSE: I believe so. I don't recall representing -- in fact, to be very truthful, I didn't remember representing him in that case until I procured the Certified Copy of Conviction this morning.

THE COURT: Do you have any specific recollection of your representation of Mr. Proctor?

MR. ROSE: Now, I do.

THE COURT: Are they recollection, or do you just know it from the fact?

MR. ROSE: No, I recall the incident, and I recall the codefendant in this case.

THE COURT: Just to be clear, that relationship ended in 1979; is that right?

MR. ROSE: I believe it would have ended July 30.

THE COURT: And you don't feel you're affected--

MR. ROSE: Excuse me, probably August 2.

THE COURT: 1979?

MR. ROSE: Yes.

THE COURT: You don't feel your effectiveness is impaired in any way; is that right?

MR. ROSE: No.

THE COURT: Any comments, Mr. State's Attorney?

MR. BARRA: No, your Honor.

THE COURT: The Court would find that this state of affairs that has just been

described for the record does not constitute a conflict of interest nor, in fact, does any conflict of interest exist based on the representations by Mr. Rose, which are amply supported by the record.

All right. Are there any further matters to address?

* * * *

APPENDIX F

F-1

AFFIDAVIT OF MARK ROSE, ESQ.

County of Peoria)
) ss.:
State of Illinois)

MARK ROSE, ESQ., being duly sworn, deposes and says:

1. I am a practicing attorney in Peoria with offices at 321-A Main Street, Peoria, Illinois 61602. I am over twenty-one years of age and reside in Peoria County. The facts set forth herein are within my own personal knowledge and I could competently testify thereto if called as a witness in this matter. I submit this affidavit in support of Willie E. Enoch's Petition for Post-Conviction Relief in Cause No. 83-CF-1401.

2. I represented Mr. Enoch at his trial for capital murder and accompanying charges in Cause No. 83-CF-1401.

3. Prior to and during Mr. Enoch's trial, I investigated the procedure to be

followed concerning the preservation of defense objections and claims of error raised at trial.

4. In particular, I was concerned by the fact that the general criminal procedure rules require the filing of a written motion for new trial within 30 days after the jury returns a verdict of guilty. The motion for new trial is then heard immediately prior to the sentencing hearing.

5. In this capital murder case, however, the court had indicated that it would proceed directly into the sentencing phases of the case immediately upon the return of a verdict that the defendant was guilty of murder. I understood that if sentenced to capital punishment that the capital sentencing statutes provided for automatic appeals of both the trial and sentencing proceeding for the defendant

sentenced to death, thereby mandating review of the trial, and any errors that took place there, by the Illinois Supreme Court. In the event that capital punishment should not have been imposed, then the matter would have been continued to a later date for sentencing and that during the period prior to such sentencing hearing a motion for new trial would be prepared and heard.

6. Because the capital sentencing proceeding in Mr. Enoch's case was to follow immediately upon any verdict of guilty of murder returned by the jury, it was apparent that the capital sentencing procedure conflicted with the rules in non-capital cases concerning the timing of any necessity for written motions for new trial.

7. I therefore sought to resolve this ambiguity and determine whether a

written motion for new trial was necessary in Mr. Enoch's case. If it was, I also needed to determine the appropriate timing for filing the motion since the capital punishment statute provides for the automatic, immediate appeal of a capital sentence upon imposition and therefore that the trial court was divested of jurisdiction.

8. Prior to the commencement of Mr. Enoch's sentencing hearing, I sought guidance on this issue from Judge Donald C. Courson, the trial judge in Mr. Enoch's case. I also inquired of others in the Public Defender's Office, including the Appellate Defender's office in Springfield.

9. I explained to both Judge Courson and the Appellate Defender's office the conflict between the general rule on written motions for new trial and the sentencing procedure in capital cases. I

also indicated to both the Judge and the Appellate Defender my belief that the Illinois death penalty statute "trumped" the general procedural rule, thereby dispensing with the necessity for a written motion in Mr. Enoch's case.

10. Both Judge Courson and the Appellate Defender indicated that they understood my problem, and that they thought my belief that a written motion was unnecessary for the reason I stated was persuasive. Despite that, however, neither Judge Courson nor the Appellate Defender's office could provide me with an answer to the question of whether my belief was correct.

11. In view of my inability to obtain guidance from the court and others in the Public Defender's office, I relied on my belief that the Illinois death penalty procedures prevailed over the general rules

governing written motions for new trial. I therefore went forward with Mr. Enoch's sentencing procedure without filing a written motion for new trial.

12. If I had known or been advised that a written motion for new trial was necessary in Mr. Enoch's case, I would have sought a continuance of sufficient time from Judge Courson prior to the sentencing hearing, during which I would have reviewed the trial record, identified the grounds for the motion, and prepared the written motion itself.

FURTHER AFFIANT SAYETH NAUGHT.

/S/ Mark Rose
Mark Rose, Esq.

Subscribed and sworn
to before me this 14th
day of March, 1990.

/S/ Donna Lavin
Notary Public

Supreme Court, U.S.
FILED
MAY 30 1992
OFFICE OF THE CLERK

(3)

No. 91-1736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIE E. ENOCH,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should deny certiorari where there was no actual conflict of interest which adversely affected petitioner's attorney's performance and, thus, there was no conflict between this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and Illinois' requirement of contemporaneous representation.

2. Whether this Court should deny certiorari where the Illinois Supreme Court correctly applied Illinois law regarding the requirement of filing a post-trial motion to preserve issues on appeal in capital cases.

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No. 91-1736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIE E. ENOCH,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The State of Illinois asks this Court to deny the Petition for Writ of Certiorari to review the judgment and order of the Supreme Court of Illinois, entered December 19, 1991, insofar as the petitioner does not raise an issue worthy of review.

OPINION BELOW

The opinion below is cited as *People v. Enoch*, 146 Ill. 2d 44, 585 N.E.2d 115 (1991). A copy of the opinion is included in petitioner's appendix.

STATEMENT OF THE CASE

Petitioner, Willie E. Enoch, seeks review of the December 19, 1991 judgment of the Illinois Supreme Court affirming his conviction and death sentence. Review involves an examination of two issues: first, whether there is a conflict between this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and the Illinois Supreme Court's requirement of contemporaneous representation in order to establish a conflict of interest claim; and, second, whether the Illinois Supreme Court's requirement that a defendant must both object at trial and file a written post-trial motion in order to preserve issues on appeal in capital cases, was a retroactive application which denied petitioner due process of law.

Following a jury trial in November of 1983, petitioner was found guilty of murder, aggravated kidnapping, and attempt rape. The prosecutor elected to seek the death penalty. Petitioner waived his right to a jury for sentencing and following a hearing in aggravation and mitigation the trial court sentenced petitioner to death.

On direct appeal to the Illinois Supreme Court petitioner argued that it was constitutional error for the trial court to consider its finding that petitioner presented a "clear and present danger" in imposing a sentence of death. The People answered that no error existed where the remarks of the trial court, examined in context, were simply in response to petitioner's argument in mitigation and the evidence in aggravation was overwhelming. The Illinois Supreme Court found that this issue was waived on appeal because petitioner failed to file a post-trial motion. This Court denied petitioner's petition for a writ of certiorari. *Enoch v. Illinois*, 488 U.S. 917 (1988).

On April 13, 1989, petitioner filed a *pro se* petition for post-conviction relief, and on March 19, 1990, with the assistance of counsel, petitioner filed an amended petition for post-conviction relief, alleging *inter alia*, that his trial counsel had a conflict of interest that rendered him ineffective, and that the Illinois Supreme Court denied petitioner due process by creating and retroactively applying a "new" post-trial motion rule.

The State moved to dismiss both petitions. On April 19, 1990, the circuit court granted the State's motion to dismiss both the *pro se* and the amended petition.

The Illinois Supreme Court affirmed the dismissal of petitioner's post-conviction petitions on February 3, 1992. The petition for a writ of certiorari was filed with this Court on May 1, 1992.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DENY CERTIORARI WHERE THERE WAS NO ACTUAL CONFLICT OF INTEREST WHICH ADVERSELY AFFECTED PETITIONER'S ATTORNEY'S PERFORMANCE AND, THUS, THERE WAS NO CONFLICT BETWEEN *CUYLER v. SULLIVAN*, 446 U.S. 335 (1980) AND ILLINOIS' REQUIREMENT OF CONTEMPORANEOUS REPRESENTATION.

Petitioner claims that the Illinois Supreme Court's requirement of contemporaneous representation to establish a claim of conflict of interest is contrary to the Sixth Amendment right to the effective assistance of counsel and to this Court's holding in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Petitioner's claim is without merit.

The right to effective assistance of counsel comprises two correlative rights: the right to reasonably competent counsel and the right to counsel's undivided loyalty. *Wood v. Georgia*, 450 U.S. 261, 271-2 (1981). Petitioner complains he has been deprived of the effective assistance of counsel based upon the latter of these two rights. However, petitioner has failed to establish that his attorney actively represented conflicting interests or that an actual conflict of interest adversely affected his counsel's performance.

Generally, in order to succeed on an ineffective assistance of counsel claim, petitioner must overcome a strong presumption that his attorney's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). In order for petitioner to demonstrate that he was deprived of the effective assistance of counsel, he must demonstrate that:

(1) his attorney's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of that proceeding would have been different. *Id.* at 687-88. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffective claim. *Id.* at 700.

The first prong of the *Strickland* analysis addresses the performance aspect of counsel's representation. The competency of counsel may not be challenged based upon the exercise of judgment, discretion, trial tactics or strategy even in those instances where appellate counsel or the reviewing court may have handled things differently. *Id.* at 689. Petitioner must show that counsel made mistakes so serious that counsel was not functioning as the "counsel" guaranteed to petitioner by the Sixth Amendment. *Id.* at 687.

Even if this Court finds that counsel's conduct fell short of the first prong of the *Strickland* standard, in applying *Strickland*'s two-pronged standard, the court need not determine whether counsel's performance was deficient before examining the prejudice suffered by petitioner as a result of the alleged deficiencies. *Strickland*, 466 U.S. at 679. "If it is easier to dispose of an ineffectiveness claim on the ground of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* Petitioner must show that there is a reasonable probability that, but for counsel's mistakes, the end result of the trial would have been different.

However, there is an exception to this rule. This Court has held that one type of actual ineffectiveness claim warrants a limited presumption of prejudice. Where counsel is burdened by an actual conflict of interest, prejudice may

be presumed, but only if petitioner demonstrates that counsel "actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 692 (*quoting Cuyler v. Sullivan*, 446 U.S. at 350. The **possibility** of a conflict is insufficient to overturn a criminal conviction. *Cuyler v. Sullivan*, 446 U.S. at 350.

Thus, just as the test for competent counsel contains two prongs, (1) deficient performance and (2) prejudice, so too does the test for conflict-free counsel. This latter test requires that before a defendant may succeed on a claim that he was deprived of his right to counsel's undivided loyalty, he must prove: (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance. *Strickland*, 466 U.S. at 692.

Petitioner has failed to present evidence that his counsel actively represented conflicting interests. The instant case is unlike those in which courts have held that an actual conflict of interest exists. At least one court has found that where an attorney representing an appealing defendant could have been exposed to liability if a favorable outcome for the defendant was reached, an actual conflict of interest existed. *Mathis v. Hood*, 937 F.2d 790, 795 (2d Cir. 1991). In *Mathis*, the defendant brought a habeas corpus proceeding alleging that his due process rights were violated by a six year delay in hearing his appeal from his state court criminal conviction. Reversal of the defendant's conviction could have exposed the defendant's attorney to liability for his part in the delay. Affirmance, on the other hand, would have avoided sanctions against the attorney. The court held that where an attorney representing an appealing defendant could have been exposed

to liability if there was a favorable result for her client, an actual conflict of interest existed. *Id.*

Unlike *Mathis*, petitioner's counsel in the instant case would have been exposed to neither liability nor sanctions if the trial court reached a favorable result for petitioner. Counsel had nothing to gain if petitioner lost in court. Proctor was counsel's ex-client, and, further, counsel had no professional relationship with Proctor for many years. Thus any claim that counsel's loyalty was in any way compromised because he was defending petitioner where Proctor was a witness for the State is meritless.

Courts have held that even evidence that strongly indicates there **may have been** a conflict of interest is insufficient to resolve a petitioner's ineffective assistance of counsel claim. *United States v. Gambino*, 788 F.2d 938, 953 (3rd Cir. 1986). It must be shown that trial counsel labored under an **actual conflict** of interest. *Id.* In *Gambino*, trial counsel simultaneously represented, in separate proceedings in federal courts, two clients accused of committing the same crime. The court held that evidence strongly indicating that there may have been a conflict of interest was insufficient to resolve an ineffective assistance of counsel claim, instead, the court required the defendant to show that the trial counsel labored under an actual conflict of interest. *Id.*

Like the defendant in *Gambino*, petitioner has provided evidence that there may have been a conflict of interest. However, petitioner's evidence of a conflict is even weaker than Gambino's. In *Gambino*, counsel simultaneously represented two clients accused of committing the same crime. Here, counsel represented the State's witness four years earlier in a completely different matter. Furthermore, the professional relationship between counsel and

the State's witness had ceased to exist. Petitioner has failed to meet his burden. He has not demonstrated that his counsel actively represented conflicting interests. Accordingly, this Court should deny the petition for writ of certiorari.

II.

THIS COURT SHOULD DENY CERTIORARI WHERE THE ILLINOIS SUPREME COURT CORRECTLY APPLIED ILLINOIS LAW REGARDING THE REQUIREMENT OF FILING A POST-TRIAL MOTION TO PRESERVE ISSUES ON APPEAL IN CAPITAL CASES.

A. Both The Statute And Caselaw Provided Petitioner With Prior Notice As To The Post-Trial Motion Requirements For Preserving Issues On Appeal.

Petitioner contends that the Illinois Supreme Court improperly denied him meaningful appellate review, where the Court held that petitioner's failure to file a post-trial motion waived several issues on appeal. Petitioner contends that application of the post-trial motion requirement of Paragraph 116-1 of the Illinois Code to capital cases like the instant case, amounts to a rule change without prior notice in violation of petitioner's due process rights. Respondent submits that the Illinois Supreme Court correctly applied Illinois law to determine which issues were waived on appeal and which issues were subject to review on the merits.

Section 116-1 of the Code of Criminal Procedure of 1963, which was in effect at the time of petitioner's trial, specifies that "motions for a new trial by defendants in criminal cases shall be in writing and shall specify the grounds therefor." Ill. Rev. Stat. Ch. 38, §116-1 (1965). The enactment of §116-1 in 1963 did not affect any change in substance nor alter the rights of either of the parties in a

criminal proceeding. *See*, Committee Comments following article 116-1, Ill. Rev. Stat. Ch. 38, §116-1 (1965). Therefore, the statute itself provided petitioner with prior notice as to the requirements for preserving issues for appeal.

Furthermore, prior to petitioner's conviction, the Illinois Supreme Court held that failure to specify grounds for a new trial in writing in a motion for a new trial constitutes waiver of the issues on review in the absence of plain error. *People v. Pickett*, 54 Ill. 2d 280, 296 N.E.2d 856 (1973). The Court also found that this waiver rule applied to constitutional questions as well as to other issues. *Id.* In *People v. Irwin*, 32 Ill. 2d 441, 207 N.E.2d 76 (1965), the defendant had not raised in his motion for a new trial any of the questions raised on review. The Illinois Supreme Court held all of those questions were waived. The Court noted that requiring the defendant to specify alleged errors in a motion for a new trial may save the delay and expense inherent in an appeal, as well as focus the attention of the trial judge upon those aspects of the procedures of which the defendant complains. Accordingly, petitioner was also provided with caselaw apprising him of the requirements for preserving issues for appeal.

Petitioner contends that Illinois Supreme Court Rule 606(a) "trumps" Paragraph 116-1, therefore, he concludes that written post-trial motions are not necessary to secure appellate review. (Petition at 36). Petitioner's contention is erroneous.

Although the Illinois Supreme Court is required by the Illinois Constitution to review all cases in which a sentence of death is imposed, Ill. Const. 1970, Art. VI, §4(b), in balancing the provisions, the Court has held that the obligation to review death penalty cases does not require it to review every issue raised on appeal when the issues

are not properly preserved by both an objection in the trial court and a written post-trial motion. *People v. Caballero*, 102 Ill. 2d 23, 464 N.E.2d 223, *cert. denied*, 469 U.S. 963 (1984).

The Illinois Supreme Court has noted that although Illinois' constitution provides for the automatic review of capital cases, trial counsel nonetheless has an obligation to see that the statute requiring a post-trial motion is complied with so that review will be limited to issues of some significance. *Id.*; *People v. Porter*, 111 Ill. 2d 386, 489 N.E.2d 1329 (1986). By limiting its review in cases where no post-trial motion is filed, the Court promotes judicial economy and finality of judgments. In this way, the Court protects not only the rights of criminal defendants, but also the integrity of the judicial system. Without a post-trial motion limiting the consideration to errors considered significant, the appeal is open-ended. Appellate counsel may then comb the record for every semblance of error and raise issues on appeal whether or not trial counsel considered them of any importance.

In the present case the court defined the limits of such review in cases where defendant fails to comply with the statutory requirement to file a post-trial motion. The court held that such review will be limited to constitutional issues which have been raised properly at trial and which can be raised later in a post-conviction hearing petition, Ill. Rev. Stat. Ch. 38, §122-1 (1983), sufficiency of the evidence and plain error.

Petitioner contends that such definition of the extent of review absent a written motion was without warning. However, the Illinois Supreme Court already addressed that issue in this case, when it stated:

> Quite to the contrary, the procedure we outline is in fact an **expansion** of the right of review previously allowed by this court when no written post-trial motion has been filed. As stated in *People v. Pickett*, 54 Ill. 2d 280, 296 N.E.2d 856 (1973), such a failure has, in the past constituted error, except in cases involving plain error.

People v. Enoch, 122 Ill. 2d 176, 190-91, 522 N.E.2d 1124, 1132 (1988) (emphasis added).

The Court then went on to address the merits of those issues that fell within the stated categories. Clearly, the Illinois Supreme Court properly applied Illinois waiver law in subjecting the instant case to its required review. Only after finding that the issue here was not properly preserved for review by the filing of a written post-trial motion and after finding that this issue did not fit into one of the three exceptions to the expanded Illinois waiver rule did the Court find the issues were waived and not subject to review.

Illinois law allows for review of errors which have not been properly preserved where the evidence is closely balanced under the plain error doctrine. *People v. Pickett*, 54 Ill. 2d 280, 296 N.E.2d 856 (1973). However, justice does not require the application of the plain error doctrine under the facts of this case. Here, the evidence of petitioner's guilt was proven by overwhelming evidence.

B. The Illinois Supreme Court's Proper Application Of Its Post-Trial Motion Rule Does Not Conflict With This Court's Decision In *Bouie v. City of Columbia.*

Petitioner claims he had no fair warning as to the type of conduct the Illinois statute required. He claims that the Illinois Supreme Court retroactively applied a "new

rule" in conflict with this Court's decision in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Petitioner's claim is without merit.

Initially, respondents note that the instant case is unlike *Bouie*, because the instant case does not concern a rule proscribing criminal conduct which was retroactively applied and resulted in denying an individual due process of law. The issue here is only whether a procedural rule was retroactively applied.

Furthermore, unlike in *Bouie*, here the Illinois Supreme Court did not overrule a consistent line of procedural decisions. Rather the statute itself, effective since 1965, provided fair warning as to the requirements for preserving issues on appeal. According to Paragraph 116-1 both an oral objection and a written post-trial motion are required to preserve an issue on appeal. Ill. Rev. Stat. Ch. 38, §116-1 (1965). In addition, decisional law available prior to petitioner's commission of the crime also provided fair notice as to the requirements for preserving issues on appeal. *People v. Pickett*, 54 Ill. 2d 280, 296 N.E.2d 856 (1973); *People v. Irwin*, 32 Ill. 2d 441, 207 N.E.2d 76 (1965). Thus this Court cannot conclude that the Illinois Supreme Court's reasoning was unforeseeable given the language of the statute in question. *Hopkins v. Shillinger*, 645 F. Supp. 374, 388 (D. Wyo. 1986).

Neither can petitioner complain that the Illinois Supreme Court's decision was unforeseen because his counsel had fair notice of the statute and, further, counsel understood its requirements. The fact that petitioner's counsel incorrectly determined that the statute did not apply to capital cases and, thus, it was not necessary to file a post-trial motion in order to preserve issues for appellate review, is unfortunate. However, counsel's omission did not result

in a denial of due process,[1] nor is it in any way inconsistent with this Court's holding in *Bouie*.

CONCLUSION

In view of the foregoing reasons, respondent respectfully urges this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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This Brief was prepared with the assistance of DAVID ABELS, a second year law student at The John Marshall Law School.

[1] The Illinois Supreme Court found that trial counsel's failure to raise alleged errors during trial and in a post-trial motion for a new trial did not constitute ineffective assistance of counsel, where overwhelming evidence of defendant's guilt and aggravating circumstances demonstrated that defendant could not show any prejudice by counsel's failure. *People v. Enoch*, 122 Ill. 2d 176, 202, 522 N.E.2d 1124, 1137 (1988).